TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 53

GULF, COLORADO & SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

MRS. OLENA MOSER, ADMINISTRATRIX

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT, STATE OF TEXAS

PETITION FOR CERTIORARI FILED APRIL 16, 1928

CERTIORARI GRANTED MAY 14, 1928

(21,000)

Verdict $34000 — Plaintiff 28 — Left work
Child. F-E-E-K. Earning $18 a week =
No evidence as to what he [illegible]
his work. Permanent [illegible] Salary.
Verdict low at 6% — Int 6 yrs —
$23000. Verdict seems high =
Instructions as to Damages R 21. Did not
make clear the [illegible] over the elements
enabled. Then request ab f 9 —

10 v Kelly 240 NS,

( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

MRS. OLENA MOSER, ADMINISTRATRIX

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, STATE OF TEXAS

INDEX

	Original	Print
Record from court of civil appeals of Texas	a	1
Minute entry of judgment	a	1
Record from district court of Bell County	1	1
Caption (omitted in printing)	1	
Petition (" " ")	1	
Answer (" " ")	6	
Amended petition	7	1
Amended answer	12	6
Defendant's requested instructions to jury	16	7
Charge to jury	42	17
Defendant's exceptions to charge to jury	48	23
Judgment	52	27
Motion to set aside verdict and for a new trial (omitted in printing)	55	
Amended motion to set aside verdict and for a new trial	58	29
Defendant's bill of exception A (omitted in printing)	144	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 6, 1926

	Original	Print
Defendant's bill of exception C	153	59
Defendant's bill of exception E and F (omitted in printing)	159	
Defendant's bill of exception G	164	65
Defendant's bill of exception L and O (omitted in printing)	168	
Defendant's bill of exception P	170	68
Defendant's bill of exception XX	173	61
Caption	173	61
Testimony of J J Miller	173	61
T E House	174	62
M L House	176	64
J E Hudson	179	66
J Y Moreland	182	69
F W Dunlap	184	71
R N Cass	186	73
R H Giles	188	74
J F Dobson	189	75
Order settling bill of exceptions XX	190	77
Order overruling amended motion for new trial	191	77
Bill of exceptions on motion for a new trial (omitted in printing)	191	
Bond on appeal (omitted in printing)	227	
Bill of cost (" " ")	229	
Clerk's certificate (" " ")	233	
Statement of facts	236	78
Caption	236	78
Testimony of Mrs Olena Moser	236	78
L E Peteet (omitted in printing)	237	
W T Lockard (omitted in printing)	238a	
James Harrison	238a	79
Offer in evidence	240	81
Agreed facts	240	81
Offer in evidence	240	82
Testimony of C C Crozier	245	82
J F Francis	250	86
Mrs N A Shanklin	251	91
W J Bassett	251	91
C E Hiller	252	93
T E Baldridge	253	94
W T Keys (omitted in printing)	255	
J M Murphy (omitted in printing)	256	
Frank Williams (omitted in printing)	255	
Olivia Jackson (omitted in printing)	256	

	Original	Print
Testimony of Mrs. Olena Moser (recalled)	256	96
Ed. Temple	257	96
Brit Stanton	257	97
E. T. Kennan	258	98
C. P. Schrevongost (omitted in printing)	259	
H. C. Yon (omitted in printing)	260	
John Linner (omitted in printing)	260	
M. W. G. Hileman	261	99
—— Barrett	263	102
J. R. Rison	265	105
E. D. Shackelford (omitted in printing)	266	
Stanley Iseu	266	106
D. H. Mathias	266	106
E. R. Hicks	267	107
A. L. Hughes	268	108
A. L. Shafer	269	110
C. H. Tiglar	270	112
Sam Gaines (omitted in printing)	272	
C. C. Dickson	273	114
C. G. Clegg	275	117
W. W. Thomas	276	118
M. Naverick	277	120
H. M. Anderson	277	121
Mrs. Olena Moser (recalled)	281	126
Stipulation re statement of facts	282	126
Judge's certificate to statement of facts	282	127
Appellant's brief (omitted in printing)	283	
Opinion	333	127
Judgment	338	132
Order overruling petition for rehearing	338	132
Petition for rehearing (omitted in printing)	339	
Proceedings in supreme court of Texas	373	133
Petition for writ of error	373	133
Judgment	450	142
Clerk's certificate to order denying petition for rehearing	450	142
Petition for and order staying execution, court of civil appeals	400	143
Bond on stay, court of civil appeals (omitted in printing)	402	
Stipulation re transcript of record, court of civil appeals	404	145
Clerk's certificate, court of civil appeals (omitted in printing)	406	
Statement of points to be relied upon and designation by petitioner as to parts of record to be printed	407	145
Order allowing certiorari		154

[fols. a-6] **IN COURT OF CIVIL APPEALS OF TEXAS**

MINUTE ENTRY OF JUDGMENT

Be it remembered, that at a Term of the Court of Civil Appeals of the Third Supreme Judicial District of Texas, begun and holden, at the City of Austin, Texas, on the First Monday in October, A. D. 1925, and ending on the first Monday in July, 1926, by terms of the law, the following among other, proceedings were had, towit:

Wednesday, October 21, 1925.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Appellant,

vs.

MRS. OLENA MOSER, Administratrix, et al., Appellees

Appeal from District Court of Bell County

Judgment affirmed.

[fol. 7] IN DISTRICT COURT OF BELL COUNTY, TEXAS,
OCTOBER TERM, A. D. 1923

No. —

MRS. OLENA MOSER, Administratrix, Plaintiff,

vs.

GULF, COLORADO & SANTA FE RY. CO., Defendant

AMENDED PETITION — Filed December 4, 1923

To the Hon. Lewis H. Jones, judge of said court:

[fol. 8] I

Now comes plaintiff Mrs. Olena Moser, Administratrix and leave of the Court being first had and obtained files this her first amended petition in lieu of the original filed herein on the — day of —— A. D. 1923, and for cause of action represents unto the court:

2

That since the filing of this suit by plaintiff as Temporary Administratrix of the Estate of John H. Moser, that plaintiff Mrs. Oleta Moser has been appointed by the County Judge of Bell County, Texas, sitting in probate as permanent administratrix of said estate, and that she has duly qualified as such, and has taken the oath and made the bond required by law. That letters as such administratrix, and of administration have been issued to her by the Clerk of the County Court of Bell County, Texas, that by virtue of her said appointment and qualification she is the personal representative of the said John H. Moser and his estate, and she now appears herein as such administratrix, and prosecutes this suit, and that she resides in Bell County, Texas.

3

That the defendant is a railroad corporation, duly and legally created and existing under and by virtue of the laws of the State of Texas, and owns and operates a line of railroad running in and through the State of Texas, and in and through the County of Bell, and thence in and through the County of Burleson and on to the City of Galveston, all in said state, and in connection therewith, employs and works a large number of trainmen, including brakemen, engineers and conductors who run and operate the trains of defendant for it over its said line of railway, and the said defendant has been duly cited to appear and answer herein, and has entered its appearance in this cause.

[fol. 9]

4

Plaintiff represents that on the days and dates hereinmentioned, the defendant was a common carrier by railroad and engaged in commerce between the State of Texas and the State of Oklahoma and between the State of Texas and various other states throughout the United States of America, and that the deceased John H. Moser, hereinafter referred to, at the time he received the injuries resulting in his death was employed by the defendant in such interstate commerce, and at the time he received such injuries, was in the performance of duties in interstate commerce.

5

That heretofore, to wit on or about the 23rd day of April A. D. 1923, John H. Moser, the husband of this plaintiff, was employed by the defendant in the capacity as a brakeman, working as a trainman in the operation of one of defendant's trains over its said line of railroad, and doing any and all things required of him by the defendant in connection with such work. That while so employed, his duties in that behalf required him to do and perform all the services usually and customarily rendered and performed by such employes in that service, as well as all things which the defendant might command and require him to do. That on or about said date, while in the usual and customary pursuit of his duties, near Lyons in Burleson County, Texas, and while acting as a brakeman on a train of said defendant, then and there being operated by the defendant over its said line of railroad, and while in the performance of his duties on one of the cars in said train of defendant, the said John H. Moser fell through the floor of said car, the same being a freight car, and was run over by said train and sustained injuries resulting in his death. That plaintiff and the said John H. Moser at the time he received said injuries and prior thereto resided in Bell County, Texas.

[fol. 10]

6

Plaintiff alleges that she is the surviving wife of said John H. Moser, deceased, and that Mary Virginia Moser, a girl about eighteen months of age at the time of her father's death, is the child of plaintiff and the said John H. Moser, and that the said John H. Moser left surviving him no other child or children.

7

Plaintiff brings this suit for the use and benefit of herself and the said Mary Virginia Moser, above mentioned.

8

Plaintiff represents that the injuries and death of the said John H. Moser were caused by the negligence and carelessness of the defendant as follows:

It was the duty of the said defendant to furnish to the said John H. Moser a safe place to work, and safe cars on and about which to work, but notwithstanding its duty in that respect it carelessly and negligently was transporting in said train, and furnished a car in said train on which and about which the said John H. Moser was employed and required to work, that was defective and dangerous, in that the floor of said car which was made of iron, steel or some other metal, through use, wear or exposure had become so rusted, eroded and worn so that the same was insecure to sustain the weight of a man stepping upon the same, and said floor was insecurely fastened in said car so as to prevent one stepping on the same from falling through. And the said John H. Moser, while in the performance of his duties, stepped upon the floor of said car, and the same being rusted, eroded and worn, and that portion of said floor being insecurely fastened in said car, he the said John H. Moser, fell through the same upon the track of said railroad and was run over and killed by said train, through the carelessness and negligence of the defendant aforesaid.

That the said defendant, its servants, agents and employes knew of the said rusted, eroded, worn, insecure and [fol. 11] defective condition of said car, or by proper inspection should and would have known of the same, but carelessly, and negligently failed to repair or remedy the same, and failed to give the said John H. Moser any notice of such condition and failed to warn him or advise him of the danger or of the condition thereof.

9

Plaintiff alleges that the negligence of the defendant aforesaid was the direct and proximate cause of the injury and death of the said John H. Moser.

10

Plaintiff alleges that at the time of his death, which occurred on or about the 22nd day of April A. D. 1923, the said John H. Moser was twenty eight years of age, in good health and well qualified for the discharge of his duties; that he was an experienced brakeman, and well qualified for the pursuit of said occupation, and at the time of his

death and for a long time prior thereto, he did earn and receive therefrom the sum of two thousand dollars per annum, that according to the rules of said railway company, and according to the custom in vogue of said railway company was in line for promotion and according to the rules of *seniority* in vogue and practice and according to the said rules and customs of said railway company, and within a very short time, would have been entitled to and would *and* — have been promoted to the position of conductor in the service of said company and would have earned therefrom and thereby the sum of three thousand dollars per annum, and would have continued to earn the same during the term of his natural life.

That he had since his marriage with his wife worked for the support of his family consisting of plaintiff and said child Mary Virginia Moser, providing them with the necessities of life, and spending his earnings upon them, and would have educated the child above mentioned in a manner suitable to his station in life. That the said John H. Moser was a man of exemplary habits, devoted to his family, [fol. 12] kind and affectionate, and that *the* would have given his said child the benefit of a father's care, training and advice and counsel, that said child and plaintiff were dependent upon his earnings for their support, maintenance and education.

11

Plaintiff further alleges that the said John H. Moser sustained his said injuries without any fault or negligence on his part, and that at the time of his injury he was wholly unaware of the danger and peril which confronted him. Plaintiff alleges that by reason of the premises, she and the said Mary Virginia Moser have sustained actual damages in the sum of eighty thousand dollars.

12

Wherefore plaintiff prays the court that upon final hearing hereof, she have judgment, as administratrix, for the sum of Eighty Thousand Dollars, and that the same be apportioned among the parties entitled thereto in such shares as the Jury and Court may see fit, for costs of suit and for such other and further relief, special and general, in law

and in equity as plaintiff may show they are entitled to receive.

A. L. Curtis, Attorney for Plaintiff.

[File endorsement omitted.]

In District Court of Bell County

[Title omitted.]

Amended Answer—Filed December 6, 1923

Now comes the defendant, leave of the Court being first had and obtained, and files this its First Amended Original Answer heretofore filed herein, and for amendment says: [fol. 13] Now comes the defendant, Gulf, Colorado & Santa Fe Railway Company, and excepts to plaintiff's petition filed herein, and says the same is insufficient in law and of this it prays judgment of the Court.

W. W. Hair, Terry, Cavin & Mills, Lee, Lomax & Wren, Attorneys for Defendant.

For answer herein, this defendant denies all and singular the allegations in plaintiff's petition contained, and says that it is not guilty of the wrongs, injuries and trespasses complained of, and of this it puts itself upon the country.

W. W. Hair, Terry, Cavin & Mills, Lee, Lomax & Wren, Attorneys for Defendant.

Further answering herein, defendant says that if deceased was injured as alleged by falling through the floor of the car, that the said car came to the defendant loaded from a foreign line at Gulf Junction, Oklahoma, having been loaded and shipped from the State of Pennsylvania, having been on its journey from the point of shipment in Pennsylvania to Gulf Junction where it was delivered to this defendant in about fourteen days after shipment; that it was delivered to this defendant at said Gulf Junction in and as a part of a train and the defendant had a right under the law and the facts to assume and did assume the floor was in proper and safe condition for use by its employes; but the defendant had said car inspected in the

usual and proper way after it received the same, and such inspection failed to reveal the defects in said car, if any, which caused the death of said John H. Moser, and that if the floor of said car was in any way defective, the same was not the result of defendant's negligence or want of proper care on its part in regard thereto.

[fols. 14 & 15] The defendant further says that is there were any defects in said car indicating or suggesting that it was not sufficient to hold a man walking thereover or jumping thereon, that the deceased had the same opportunity to see the same, as did the defendant and its inspectors, and if the defendant or its inspectors should have known of said defect in said car, then deceased should also have known of same, and had notice thereof, and assumed the risk of injury therefrom, and was guilty of negligence in using said floor of jumping thereon, with notice of such defects.

Therefore, defendant says that plaintiff is not entitled to recover, at least to the extent he was guilty of contributory negligence as aforesaid.

W. W. Hair, Terry, Cavin & Mills, Lee, Lomax & Wren, Attorneys for the Defendant.

[File endorsement omitted.]

[fol. 16] In District Court of Bell County

[Title omitted]

Defendant's Requested Instructions to Jury—Filed December 8, 1923

Defendant requests the Court to charge the jury as follows:

Gentlemen of the Jury: In the determination of the amount of damages, if any that you will allow on account of the pecuniary loss, if any, sustained by Mrs. Moser, you are charged that if you believe and find that there is a reasonable probability that Mrs. Moser may marry again (and this question you may determine from your experience and judgment) you will confine the award of damages, if any

you may make on behalf of the said Mrs. Moser to the period of her probable widowhood as you may determine the same.

W. W. Hair, Lee, Lomax & Wren, Attorneys for defendant.

Special Charge No. 3.

The above and foregoing special charge was presented and requested by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement here is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the rulings of the Court as shown.

Lewis H. Jones, Judge Presiding.

[File endorsement omitted.]

[fols. 17-19] [Title omitted]

Defendant requests the Court to charge the jury as follows:

Gentlemen of the Jury: You are charged that under the law and the evidence in this case, you will not allow the plaintiff anything on account of any benefit for "the benefit of a father's care, training, advice and counsel" as set up in plaintiff's petition, and you will not allow the plaintiff anything on account of any such matters or take any such matters into consideration in determining your verdict.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Defendant.

Special Charge No. 4

The above and foregoing special charge was presented and requested by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed and made a

part of the record in this cause, as defendant's bill of exceptions to the ruling of the Court is shown.

Lewis H. Jones, Judge Presiding.

[fol. 20] [Title omitted]

Defendant requests the Court to charge the jury as follows:

GENTLEMEN OF THE JURY: In consideration of your verdict on the question of damages, and under the special issues submitted to you in that connection, and thereunder in determining "such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child", for their pecuniary loss, you are instructed that in determining the present value of such contributions as plaintiff would probably have received from the continued life of the deceased, you will make your calculations on the basis of the amount of your award bearing interest at 8%, the undisputed testimony in this case showing that money can be safely loaned at such rate of interest.

W. W. Hair, Lee, Looney & Wren, Attorneys for Defendant.

Special Charge No. 7.

The above and foregoing special charge was presented and requested by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the ruling of the Court as shown.

Lewis H. Jones, Judge Presiding.

[fol. 21] [Title omitted]

Defendant requests the Court to charge the jury as follows:

GENTLEMEN OF THE JURY: In considering of your verdict on the question of damages, and under the special issues submitted to you in that connection, and thereunder

in determining "such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child," for their pecuniary loss, you are instructed that in determining the present value of such contributions as plaintiff would probably have received from the continued life of the deceased you will make your calculations on the basis of the amount of your award, bearing interest at the highest net rate of interest that the testimony shows can be had on money safely invested, and so entrel as shown by the testimony in this case.

W. W. Hair, Lee, Lemay & Wren, Attorneys for Defendant

Special charge No. 8

Only asked if Special Charges No. 10 and No. 7 be refused.

The above and foregoing special charge was presented and requested by the defendant after defendant's request for preceding instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon as now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the ruling of the Court as shown.

Lewis H. Jones, Judge Presiding.

[fol. 22] [Title omitted]

Defendant requests the Court to charge the jury as follows:

Gentlemen of the Jury: In determining of your verdict on the question of damages, and the amount, if any, that you will award to Mrs. Moore because of her pecuniary loss by reason of the death of her husband, you will consider that under the law it is the wife's duty to render such service to her husband as the relationship of husband and wife reasonably imposes upon her, and you will determine from the evidence the nature and character of the service that Mrs. Moore would probably have rendered to her husband as wife, had he continued to live, and the draft that would have been made on her time, energy and strength in the

rendition of such service; and you will determine further from the testimony what is the reasonable present cash value of such time, energy and strength that by reason of his death are saved to her and that are available to her to be used by her otherwise and such value as so determined by you, you will credit on and deduct from the present cash value of the pecuniary contributions that the said Moser may have made to said wife if he had continued to live, and the difference between such values will constitute your award of damages as to the said Mrs. Moser in answer to Special issue No. 7, and the apportionment thereof.

In this connection you are further charged that in determining the value of the time, energy and strength if any saved to Mrs. Moser on account of the services she would [fol. 23] have rendered to her husband if he had continued to live, you will consider the education of Mrs. Moser, her character and ability to earn money, and such other matters as would give value to her service, in so far as you can determine the same from the evidence before you and from your experience in such matters.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Defendant.

Special Charge No. 9

The above and foregoing special charge was presented and requested by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the ruling of the Court as shown.

Lewis H. Jones, Judge Presiding.

[Title omitted]

Defendant request the Court to submit to the jury the following:

Gentlemen of the Jury: You are charged that if Mr. Moser had continued to live, the minor plaintiff would have been under obligations to render service to him as her

father until the child reached 21 years of age or married, and by the death of her father she is relieved of the rendition of such service and such draft as the same may have made upon her time, energy and strength, and you are instructed in determining the damages that you may allow [fol. 24] the minor plaintiff under the court's charge, you will determine the present cash value of such services as the said child may have so rendered her said father (and you may determine the same in the light of and under your experience in such matters) and you will deduct the present cash value of such service from the present cash value of any contributions that the father may have rendered his minor daughter if he had continued to live, as you may determine the same from the evidence and under the charge, and the difference will constitute your award of damages as to said minor, and your answer to special issue No. 7 as to the said minor and to the apportionment of the award in behalf of said minor.

W. W. Hair, Lee, Lemay & Wren, Attorneys for Defendant.

Special Charge No. 10

The above and foregoing special charge was presented and requested by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the ruling of the Court as shown.

Lewis H. Jones, Judge Presiding.

[Title omitted]

Defendant request the Court to submit to the jury the following:

[fol. 25-26] Gentlemen of the Jury: In the consideration of "such nurture, advice and training, if any, as the evidence may show the child may receive from the deceased after the time of his death," as such matters are submitted to you in charge, you will consider only such nurture, ad-

vice and training, if any, as if of a character that can be measured by a money value, that is, such as *could* be supplied by the services of another for compensation, and in the assessment of damages, you will not allow anything on behalf of the minor plaintiff as to such matters except to the extent and in so far as you may believe from the evidence such nurture, advice and training will have to be supplied and will be supplied by the services of another secured for compensation.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Defendants.

Special Charge No. 11.

Only asked if Special Charge No. 1 and No. 5 are refused.

The above and foregoing special charge was presented and requested by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the ruling of the Court as shown.

Lewis H. Jones, Judge Presiding.

[fol. 31] [Title omitted]

Defendant requests the Court to charge the jury as follows:

GENTLEMEN OF THE JURY: In determining the question of the probable contributions by Mr. Moser to his wife and child, and his probable earnings, as a basis therefor, if he had not died, you will take into consideration the possible decrease in his wages or earnings, if any, as you may believe will reasonably result in the future, if any, from the return from the abnormal or unusual conditions, the result of the great war the country has recently gone through, to normal or usual conditions, that is such conditions as might reasonably be expected to exist when the influence of the war and the conditions arising out of it are removed, if you find that such a return will probably come; and you will consider such decrease and diminution, if any,

in the probable earnings of the deceased, and the result and diminution, if any, in his contributions to his wife and daughter, if any, in so far as in your judgment there will be such decrease and diminution from such purchase, if any, in so far as in your judgment there will be such de- [fol. 32] crease and diminution from such cause.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Defendant.

Special Charge No. 17.

The above and foregoing special charge was presented and requested by the defendant after the defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed, and made a part of this cause, as defendant's bill of exceptions to the ruling of the Court as shown.

Lewis H. Jones, Judge Presiding.

[Title omitted]

Defendant requests the Court to charge the jury as follows:

Gentlemen of the Jury: In determining the amount of the probable future earnings of the deceased and his probable contributions to his wife and child under oath instructions given you, had Mr. Moser continued to live, you will take into consideration such reasonable decrease in his earning capacity as was reasonable to be expected from advancing age, and such diminution in his income as might reasonably result from such loss of time as he may have from sickness or any other cause, or the reasonable probability, if any, of his being out of employment from any cause determining such matters in the light of your experience in human affairs and you will give to each and [fols. 33-37] all of such matters such consideration and weight in the determination of the amount of contributions deceased Moser would probably have made to his wife and child, as you think they are entitled to, and to the extent that you think they should be given such consideration, you

will consider them in the reduction of any damages or award you might otherwise make to the wife and child.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Deft.

Special Charge No. 18.

The above and foregoing special charge was presented and requests by the defendant after the defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the ruling of the Court as shown.

Lewis H. Jones, Judge Presiding

[fo. 38] [Title omitted]

Defendant requests the Court to charge the jury as follows:

GENTLEMEN OF THE JURY: In determining the question of damages, under the charge and in making your computation as to what amount of damages plaintiff is entitled to recover, you will take into consideration the likelihood of the earnings of the deceased becoming less during the latter years if his life had be lived and also any period of the time that his earnings might cease due to sickness or any other causes, if any, that would in any way lessen his ability to contribute to his family, making such deduction in the amount of damages as you may think should be made on account of such matters.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Defendant.

[fo. 39] Special Charge No. 24.

The above and foregoing special charge was presented and requested by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by

the Court was refused, and this special charge with this endorsement hereon is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the rulings of the Court as shown.

Lewis H. Jones, Judge Presiding.

[Title omitted]

Defendant requests the Court to charge the Jury as follows:

GENTLEMEN of the JURY: In determining of your verdict on the question of damages and the amount of probable contributions by deceased to his wife and child, you will take into consideration the hazardous nature of the employment in which he was engaged, and make such reduction of such probable contributions as you believe ought to be made on account thereof.

W. W. Hair, Lee, Lomax & Wren, Attys. for Deft.

[fol. 40] Special Charge No. 23.

The above and foregoing special charge was presented and request by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed and made a part of the record in this cause, as defendant's bill of exceptions to the rulings of the Court as shown.

Lewis H. Jones, Judge Presiding.

[Title omitted]

Defendant requests the Court to charge the Jury as follows:

GENTLEMEN OF THE JURY: In determining of your verdict on the question of damages under the charge of the Court, you will take into consideration the possibility or probability of Mrs. Moser marrying again, and make such allowance and deduction in the amount of damages that you might otherwise award, if any, on account of such possibil-

ity or probability of remarriage, as in your judgment should be made.

W. W. Hair, Lee, Looney & Wren, Attorneys for Defendant.

Special Charge No. 26.

[fol. 41] The above and foregoing special charge was presented and requested by the defendant after defendant's request for peremptory instruction was refused, and after the Court had submitted his general charge to counsel, and at the time and place required by law, and being considered by the Court was refused, and this special charge with this endorsement hereon is now here ordered filed and made a part of the record in this cause as defendant's bill of exceptions to the rulings of the Court as shown.

Lewis H. Jones, Judge Presiding.

[fol. 42] In District Court of Bell County

[Title omitted]

Charge to Jury. Filed December 8, 1923

Gentlemen of the Jury: This case is submitted to you upon special issues, that is, it is submitted to you in the form of questions which you are required to answer, and your answers to the several questions propounded to you will constitute your verdict in the case. You will answer each of the questions from the evidence, and from no other source, and sign each of the same by your foreman, and return the same into Court.

In connection with the questions propounded to you, such legal definitions and statements of the law are given to you as are deemed by the Court necessary and proper to assist you in arriving at the proper answers to the [fol. 43] questions propounded.

1

Ordinary care, is such care as an ordinarily prudent person would have exercised under the same or similar circumstances.

2

Negligence is defined to be the want of ordinary care, that is, the want of such care as an ordinarily prudent person would have exercised under the same or similar circumstances.

3

Contributory Negligence, as a law term, means such an act or omission on the part of the injured party as an ordinarily — person would not do or suffer to be done under the same or similar circumstances, which concurring with the negligent act or omission of a defendant, becomes a proximate cause of the injury.

4

Proximate Cause. By this phrase is meant, as a law term, an efficient cause without which the injury would not have happened, and from which danger of injury might reasonably have been anticipated as a natural and probable consequence.

5

Assumed Risk. By this term is meant, that an employe of a railway company is held, in law, to assume such risks as are ordinarily incident to the service he engages to perform, and such others as he knows of, or must necessarily have known of in the ordinary discharge of the duties of his service; but risks arising from negligence of the company's employes, that are chargeable to it, are not assumed by an employe unless he knows of them or must necessarily have known of them in the ordinary discharge of the duties of his service, and until then, he has right to assume that risks arising from such negligence do not exist.

6

The burden is upon the plaintiff to prove by a preponderance of the evidence the affirmative of all the issues [fol. 44] herein presented with the exception of contributory negligence and assumed risk, the evidence to be considered in its entirety no matter by which side adduced.

7

The burden is upon the defendant to prove by a preponderance of the evidence, to be considered in its entirety no matter by which side adduced, the affirmative of its defenses of contributory negligence and assumed risk.

8

It was the duty of the Gulf, Colorado & Santa Fe Railway Company, to exercise ordinary care to furnish to John H. Moser, a reasonably safe place to work and perform his duty, and reasonably safe cars on and about which to work and perform such duties, and its failure to do so would be negligence.

9

It was the duty of the deceased, John H. Moswr, to exercise for his own safety such care as a man of ordinary prudence would have exercised under the same or similar circumstances, and if you find at the time of the accident, deceased failed to exercise for his own safety such care as a man of ordinary prudence would have exercised under the same or similar circumstances, and such failure proximately contributed to the injury received, then he would be guilty of contributory negligence.

10

You are further instructed that any issue of fact herein may *be* established by direct evidence or by circumstantial evidence, or by both.

Bearing in mind the foregoing definitions and statements of the law, you will answer the following special issues:

Special Issue No. 1

Do you find from the evidence that the deceased, John H. Moser, while in the performance of his duties stepped [fol. 45] upon the floor of the car in question, and fell through the same and was thereby killed? Let your answer be "yes" or "no."

Answer: Yes. J. E. Hudson, Foreman.

Special Issue No. 2

Was the defendant, Railway Company, at the time of the death of John H. Moser, transporting in one of its trains, upon which he was riding, a car, the floor of which, through use, rust or exposure, was unsafe?

Let your answer be "yes" or "no."

Answer. Yes. J. E. Hudson, Foreman.

If you have answered special issue number two in the affirmative then you will answer the following question, otherwise you will not answer same.

Special Issue No. 3

Was the defendant negligent, as that term has been here inbefore defined, in transporting said car in its train in such condition? Answer "yes" or "no."

Answer. Yes. J. E. Hudson, Foreman.

If you have answered special issue number two, or if you have answered special issue numbers two and three in the affirmative, then you will answer special issue number four.

Special Issue No. 4

Do you find from the evidence that such negligence, if any, was the proximate cause of the death of said John H. Moser? Let your answer be "yes" or "no."

Answer. Yes. J. E. Hudson, Foreman.

[fol. 46] If you have answered special issue number four in the affirmative, that is, "yes", then you will answer special issue No. Five.

Special Issue No. 5

Do you find from the evidence that the deceased, John H. Moser, was guilty of contributory negligence, as that term has been defined in paragraph three hereof, in stepping upon the floor of said car, under all the facts and circumstances in this case? Let your answer be "yes" or "no".

Answer. No. J. E. Hudson, Foreman.

Bearing in mind the definition and instructions relative to assumed risk given you in paragraph five hereof, you will answer Special Issue No. Six.

Special Issue No. 6

Do you find from the evidence that the death of the deceased resulted from a risk which he assumed as a result of his employment? Let your answer be "yes" or "no".

Answer. No. J. E. Hudson, Foreman.

Regardless of what your answers may be to the questions submitted in this charge, you will assess damages, and you will arrive at the amount thereof by assessing the same at such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss as you may believe from the evidence that they had a reasonable expectation of receiving from said John H. Moser, if any, from and after the death of the said John H. Moser, if he had not died on the date alleged. By pecuniary loss is meant such loss as may be compensated for in money. In answering special issue No. 7, you will take into consideration the contribution of money and other pecuniary benefits, if any, which the evidence may show that said surviving wife and child would have received from him after the [fol. 47] time of his death, if he had continued to live; and in estimating the pecuniary loss suffered by the minor child of the deceased by reason of his death, you may take into consideration such advice and training if any, as the evidence may show that the child would have received from deceased after the time of his death, if he had continued to live, but in determining the amount of damages that you may award, if any, to the minor Mary Virginia Moser, under this charge and under special issue No. 7 and the apportionment of such award, you will confine yourselves in the consideration of such contributions that the deceased Moser might have made to his said minor child to the period of her minority.

But you are instructed that you can not consider for any other purpose the solace or grief of loss of society and companionship suffered by the deceased's widow and child.

or either of them by reason of his death, or for grief and distress on account of his death, and you can not award them or either of them any damages by way of solace or comfort for the death of the deceased; and in assessing the damages if any, you will confine yourselves solely to the determination of the pecuniary and monetary interest, if any, that the plaintiff and her child had in the continued life of deceased.

If you have answered special issue No. 5 "yes," then you are charged and instructed that in assessing the damages, you will diminish the same in proportion as — find that such failure, if any, on the part of the deceased, to exercise ordinary care for his own safety contributed to the accident complained of.

Bearing in mind the foregoing definitions and instructions on the measure of damages, you will answer special issue No. seven.

Special Issue No. 7

[fol. 48] What amount of money, if paid now, will fairly and reasonably compensate the surviving widow and child of the deceased, John H. Moser, for the actual pecuniary loss which they respectively suffered by reason of his death, if any? This question you will answer by stating the aggregate amount of such pecuniary loss or damage, and you will answer in the space below the amount you find from the evidence.

Answer: $34,000.00. J. E. Hudson, Foreman.

You will apportion the amount so found, if any, between the plaintiff, Olena Moser, and the minor child, Mary Virginia, in such shares and amount as you deem proper, and find each entitled to, if any, in the space below.

To Olena Moser, $18,000.00.
To Mary Virginia Moser, $16,000.00.

14

You, the jury, are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given their testimony, but you are bound to receive the

law from the Court, which is herein given you, and be governed thereby.

Lewis H. Jones, Judge 27th Judicial District of Texas.

[File endorsement omitted.]

In District Court of Bell County

[Title omitted]

Defendant's Exception to Charge to Jury—Filed December 8, 1923

Now comes the defendant, the Court having overruled defendant's special charge No. 1, being a request for peremptory instruction, and having submitted to counsel the Court's main charge, and now here at the time and place [fol. 40] required by law, defendant files its objections and exceptions to the Court's charge, to wit:

1

(a) To subdivision 8 of the charge, because it does not properly define the duty of the defendant as applicable to the facts of this case, and that portion thereof, reading, "That it was the duty of the defendant to exercise ordinary care to furnish John H. Moser a reasonably safe place to work and perform his duty, and reasonably safe cars on or about which to work and perform such duty," is not a correct definition of defendant's duty as applied to the facts of this case, and is misleading, and the same casts upon the defendant a burden greater and more onerous than the law requires, and the charge and definition is upon the weight of the evidence in that it in effect submits an issue which there is no evidence to support, and is not a correct statement of the law applied to the facts of this case. (a)

2

(b) Defendant excepts to special issue No. 2, and urges to said special issue all and singular the same objections that are urged to paragraph eight of the charge, and further

because the same is too broad and is not a correct statement of the issue of negligence under the facts of this case, and in effect submits an issue which under the law and under the facts is without support of the evidence. (b)

3

(c) Defendant objects and excepts to special issue No. 3 for all and singular the same reasons set forth in its objections to special issue No. 2 and its objections to subdivision eight of the Court's charge. (c)

4

To subdivision II of the Court's charge, and the charge on the measure of damages therein contained, because: [fol. 50] D (a) The Court instead of telling the jury that they will arrive at such sum as if paid in cash at this time will be sufficient to fairly compensate the surviving wife and child etc., should tell the jury that they will assess the plaintiff's damages at the present value of the contributions in money (or other thing of value if there be any other thing of value to be considered under the testimony, which defendant denies) that they may find from the evidence deceased would probably have made if he had continued to live, and should explain to the jury how much present value of such contributions may be determined under the evidence, and confining them to that portion of the evidence which affords a basis for the determination of such present value. D

E (b) Because the Court should confine the jury in their determination of damages to contributions in money, and should not submit to the jury other pecuniary benefits or any other elements except such monetary contributions, because there is no evidence in this record that warrants a finding or will support a finding of pecuniary benefits or benefits having a monetary value that the jury could determine in money other than the contributions of money and the charge on the measure of damages should be confined to that element and that alone. E

F (c) To that language in said definition "And other pecuniary benefits, if any, which the evidence may show the said surviving wife and child would receive from him

after the time of his death if he had continued to live," because there is no evidence in this record of any other pecuniary benefits shown to have a monetary vaoue or evidence on which a monetary value may be assessed other than contributions in money, and such charge is a charge upon the weight of the evidence and without evidence to support. F.

G. (d) Because said charge in so far as it submits to the jury the question of such nurture, advice and training, if any, as the evidence may show the child would receive from deceased if he had continued to live, because there is no [fol. 51] evidence that the child would have received from the deceased any nurture, advice or training of any character whatsoever, there being no testimony upon the subject; and there is no evidence that he had any qualifications or training that qualified him to render service in the way of nurture, advice or training; or such would be of value, and there is no evidence that any nurture, advice or training that he might have given his child had any pecuniary value and if so what it was, or that it was capable of being compensated for in money. G.

H. (e) Because the recovery for pecuniary benefits on the part of the wife, Mrs. Moser, is not confined to the period of her widowhood or until she may marry again, to be determined by the jury. H.

I. (f) Because as to the damage to the child and possible pecuniary contributions are not confined to the child, the jury are not confined to the period of the child's minority. I.

J. (g) To that portion of said charge beginning with the words "You are instructed that you cannot consider for any purpose the solace" and ending with the words, "continued life of deceased," because said charge is not as clear and specific and broad in its application as it should be, and is indefinite in its terms, and for this portion of said charge, defendant's special charge No. 22 should be substituted. J.

K. (h) Because said charge on the measure of damages is generally too broad and not definite and specific enough and the jury should be limited in their consideration of the measure of damages, and the damages to be awarded, and should be further and more in detail instructed as to matters they can consider and the way their verdict should

be arrived at more fully shown and in line with defendant's requested charges on the issue of damages. K.

To Special issue number 7m because:

M.(a) It does not give the jury any rule or formula by which the jury may determine the amount of money that if paid now will fairly and reasonably compensate the surviving widow and child for the actual pecuniary loss, [fol. 52] etc. M.

N. (b) Because it does not confine the jury to that portion of the testimony, to wit, *the testimony, to wit*, the testimony offered by defendants, which affords and furnishes a basis, and the only basis shown by the testimony for determining the present monetary value of the pecuniary contributions that under the testimony the jury are entitled to consider. N.

O. (c) Because the compensation is not confined as to the widow, to the period of her widowhood to be determined by the jury. O.

P. (d) Because the compensation as to the minor is not confined to her period of minority. P.

W. W. Hair, Lee, Lomax & Wren, Attorneys for Defendant.

The above and foregoing objections and exceptions having been presented to the Court at the time and place required by law, and after the Court had refused defendant's request for peremptory instruction, and had submitted to counsel its general charge, and the said objections having been considered by the Court, were in all things overruled and said objections and exceptions with this endorsement hereon are here ordered filed and made a part of the record in this cause as defendant's bill of exceptions to the ruling of the Court as shown.

Lewis H. Jones, Judge Presiding.

[File endorsement omitted.]

In District Court of Bell County

[Title omitted]

Judgment

On the 6th day of December A. D. 1923, this cause being regularly called in its order for trial, all parties, both plaintiff and defendant appeared and announced ready for trial, [fol. 53] whereupon a jury of twelve good and lawful men were duly impaneled and sworn to try said cause, and thereafter, the evidence being introduced, the charge of the Court submitted to the jury and argument of counsel made, the jury retired to consider its verdict, the same being submitted to the jury upon special issues, and thereafter, towit, on December 8, A. D., 1923, the jury returned into Court its answers to the special issues submitted, as follows:

"Special Issue No. 1

Do you find from the evidence that the deceased, John H. Moser, while in the performance of his duties stepped upon the floor of the car in question and fell through the same and was thereby killed? Let your answer be "yes" or "no."

Answer: "Yes." J. E. Hudson, Foreman.

Special Issue No. 2

Was the defendant, Railway Company, at the time of the death of John H. Moser, transporting in one of its trains, upon which he was riding, a car, the floor of which through use, rust or exposure, was unsafe? Let your answer be "yes" or "no."

Answer: "Yes." J. E. Hudson, Foreman.

Special Issue No. 3

Was the defendant negligent, as that term has been hereinbefore defined, in transporting said car in its train in such condition? Answer "yes" or "no."

Answer: Yes. J. E. Hudson, Foreman.

Special Issue No. 4

Do you find from the evidence that such negligence if any was the proximate cause of the death of the said John H. Moser? Let your answer be "yes or "no."

Answer. Yes. J. E. Hudson, Foreman.

Special Issue No. 5

Do you find from the evidence that the deceased, John H. Moser, was guilty of contributory negligence, as that term had been defined in paragraph three thereof, in step- [fol. 54] ping upon the floor of said car, under all the facts and circumstances in this case? Let your answer be yes or no.

Answer. No. J. E. Hudson, Foreman.

Special Issue No. 6

Do you find from the evidence that the death of the deceased resulted from a risk which he assumed as a result of his employment? Let your answer be yes or no.

Answer. No. J. E. Hudson, Foreman.

Special Issue No. 7

What amount of money, if paid now, will fairly and reasonably compensate the surviving widow and child of the deceased, John H. Moser, for the actual pecuniary loss which they respectively suffered by reason of his death, if any? This question you will answer by stating the aggregate amount of such pecuniary loss or damage, and you will answer in the space below the amount you find from the evidence?

Answer. $3[illegible] J. E. Hudson, Foreman.

You will apportion the amount so found, if any, between the plaintiff, Olena Moser, and the minor child, Mary Virginia Moser, in such shares and amount as you deem proper, and find each entitled to, if any, in the space below.

To Olena Moser, $1[illegible]
To Mary Virginia Moser, $[illegible]."

The Court having received the verdict of the jury and its answers to the respective issues submitted, is of the opinion that plaintiff, Mrs. Olena Moser as administratrix is entitled to recover of and from the defendant, Gulf, Colorado & Santa Fe Railway Company the sum of $34,000.00, and it is further ordered, adjudged and decreed by the Court that said plaintiff do have and recover of and from the defendant the sum of $34,000.00 and that the said amount be apportioned as follows:

[fols. 55-57] $18,000.00 to Mrs. Olena Moser, and $16,000.00 to Mary Virginia Moser, and that the said amount of $34,000.00 bear interest at the rate of six per cent from and after December 8, 1923.

It is further ordered, adjudged and decreed by the Court that said plaintiff recover of and from said defendant all costs in this behalf expended for all of which let execution issue.

(Entered Volume "V," page 216, et seq., of the Civil Minutes of the District Court of Bell County, Texas.)

[fol. 58] In District Court of Bell County

[Title omitted]

Amended Motion to Set Aside Verdict and for a New Trial — Filed January 3, 1923

Now comes the defendant, the Gulf, Colorado & Santa Fe Railway Company, and leave of the Court being first had, files this its Amended Motion for a new trial in lieu of its motion for a new — filed on the 10th day of December, 1923, and now and here moves the court to set aside the verdict of the jury heretofore rendered in this cause to grant a new trial herein, and for grounds of this motion respectfully shows to the court:

III

The Court erred in refusing to give defendant's special charge No. 3, as follows:

"In the determination of the amount of damages, if any that you will allow on account of the pecuniary loss, if

any, sustained by Mrs. Moser, you are charged that if you believe and find that there is a reasonable probability that [fol. 59] Mrs. Moser may marry again (and this question you may determine from your own experience and judgment) you will confine the award of damages, if any you may make on behalf of the said Mrs. Moser to the period of her probable widowhood as you may determine the same."

IV

The Court erred in refusing to give defendant's Special Charge No. 4 as follows:

"You are charged that under the law and the evidence in this case, you will not allow the plaintiff anything on account of any benefit for the benefit of a father's care, training, advice and counsels as set up in plaintiff's petition, and you will not allow the plaintiff anything on account of any such matters or take any such matters into consideration in determining your verdict."

[fol. 60]

VII

The Court erred in refusing to give defendant's Special Charge No. 7, as follows:

"In considering of your verdict on the question of damages, and under the special issues submitted to you in that connection, and thereunder in determining 'such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child,' for their pecuniary loss, you are instructed that in determining the present value of such contributions as plaintiff would probably have received from the continued life of the deceased, you will make your calculations on the basis of the amount of your award bearing interest at 8%, the undisputed testimony in this case showing that money can be safely loaned at such rate of interest."

VIII

The Court erred in refusing to give defendant's Special Charge No. 8, as follows:

"In considering of your verdict on the question of damages, and under the special issues submitted to you in that connection, and thereunder in determining 'such sum of

money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child,' for their pecuniary loss, you are instructed that in determining the present value of such contributions as plaintiff would probably have received from the continued life of the deceased you will make your calculations on the basis of the amount of your award bearing interest at the highest net rate of interest that the testimony shows can be had on money safely invested, and secured as shown by the testimony in this case."

IX

The Court erred in refusing to give defendant's Special Charge No. 9 as follows:

[fol. 61] "In determining of your verdict on the question of damages, and the amount, if any, that you will award to Mrs. Moser because of her pecuniary loss by reason of the death of her husband, you will consider that under the law it is a wife's duty to render such evidence to her husband as the relationship of husband and wife reasonably imposes upon her, and you will determine from the evidence the nature and character of the service that Mrs. Moser would probably have rendered to her husband as wife, had she continued to live and the draft that would have been made on her time, energy and strength in the rendition of such service, and you will determine further from the testimony what is the reasonable present cash value of such time, energy and strength that by reason of his death are saved to her and that are available to her to be used by her otherwise, and such value as so determined by you, you will credit on and deduct from the present cash value of the pecuniary contributions that the said Moser may have made to said wife if he had continued to live, and the difference between such values will constitute your award of damages as to the said Mrs. Moser in answer to Special Issue No. 7, and the apportionment thereof."

X

The Court erred in refusing to give defendant's Special Charge No. 10, as follows:

"You are charged that if Mr. Moser had continued to live the minor plaintiff would have been under obligations

to render service to him as her father until the child reached 21 years of age or married, and by the death of her father she is relieved of the rendition of such service and such draft as the same may have made upon her time, energy and strength, and you are instructed in determining the damages that you may allow the minor plaintiff under the Court's charge, you will determine the present cash value of such services as the said child may have so rendered her said father (and you may determine the same in the [fols. 62-64] light of and under your experience in such matters) and you will deduct the present cash value of such service from the present cash value of any contributions that the father may have rendered his minor daughter if he had continued to live, as you may determine the same from the evidence, and under the charge and the difference will constitute your award of damages as to the said minor, and your answer to Special Issue No. 7 as to the said minor and to the apportionment of the award in behalf of said minor."

XI

The Court erred in refusing to give defendant's Special Charge No. 11, as follows:

"In the consideration of 'such nurture, advice and training, if any, as the evidence may show the child may receive from the deceased after the time of his death,' as such matters are submitted to you in the charge, you will consider only such nurture, advice and training, if any, as is of a character that can be measured by a money value, that is, such as could be supplied by the services of another for compensation, and in the assessment of damages, you will not allow anything on behalf of the minor plaintiff as to such matters except to the extent and in so far as you may believe from the evidence such nurture, advice and training will have to be supplied and will be supplied by the services of another secured for compensation."

[fol. 65] XVII

The Court erred in refusing to give defendant's Special Charge No. 17, as follows:

"In determining the question of the probable contributions by Mr. Moser to his wife and child, and his probable

earnings as a basis therefor, if he had not died, you will take into consideration the possible decrease in his wages or earnings, if any, as you may believe will reasonably result in the future, if any, from the return from the abnormal or unusual conditions, the result of the great war the country has recently gone through, to normal or usual conditions, that is such conditions as might reasonably be expected to exist when the influence of the war and the conditions arising out of it are removed, if you find that such a return will probably come and you will consider such decrease and diminution, if any, in the probable earnings of the deceased, and the result and diminution, if any, in his contributions to his wife and daughter, if any, in so far as in your judgment there will be such decrease and diminution from such cause."

XVIII

The Court erred in refusing to give defendant's Special Charge No. 18, as follows:

"In determining the amount of the probable future earnings of the deceased and his probable contributions to his wife and child under other instructions given you, had Mr. Moser continued to live, you will take into consideration such reasonable decrease in his earning capacity as was reasonably to be expected from advancing age, and such [fols. 66 & 67] diminution in his income as might reasonably result from such loss of time as he may have had from sickness or any other cause, or the reasonable probability, if any, of his being out of employment from any cause (determining such matters in the light of your experience in human affairs) and you will give to each and all of such matters consideration and weight in the determination of the amount of contributions deceased Moser would probably have made to his wife and child, as you think they are entitled to, and to the extent that you think they are entitled to, and to the extent that you think they should be given such consideration, you will consider them in the reduction of any damages or award that you might otherwise make to the wife and child."

[fols. 68 & 69] XXIV

The Court erred in refusing to give defendant's Special Charge No. 24, as follows:

"In determining the question of damages, under the charge and in making your computation as to what amount of damages plaintiff is entitled to recover, you will take into consideration the lik-lihood of the earnings of the deceased less during the latter years of his life had he lived and also any period of the time that his earnings might cease due to sickness or other causes, if any, that would in any way lessen his ability to contribute to his family making such deductions in the amount of damages as you think should be made on account of such matters."

XXV

The Court erred in refusing to give defendant's Special Charge No. 25, as follows:

"In determining of your verdict on the question of damages and the amount of probable contributions by deceased to his wife and child, you will take into consideration the hazardous nature of the employment in which he was engaged, and make such reduction of such probable contributions as you believe ought to be made on account thereof."

XXVI

The Court erred in refusing to give defendant's Special Charge No. 26, as follows:

"In determining of your verdict on the question of damages under the charge of the Court, you will take into consideration the possibility or probability of Mrs. Moser marrying again, and make such allowance and deduction in the amount of damages that you might otherwise award, if any, on account of such possibility or probability of remarriage, as in your judgment should be made."

XXXI

[fol. 70] Because the Court erred in overruling defendant's objection and exception to Subdivision II of the Court's Charge as follows:

"The Court instead of telling the jury that they will arrive at such sum as if paid in cash at this time will be sufficient to fairly compensate the surviving wife and child, etc., should tell the jury that they will assess the plaintiff's damage at the present value of the contributions in money (or other thing of value if there be any other thing or value to be considered under the testimony, which defendant denies) that they may find from the evidence deceased would probably have made if he had continued to live, and should [fol. 71] explain to the jury how such present value of such contributions may be determined under the evidence, and confining them to that portion of the evidence which affords a basis for the determination of such present value."

XXXII

Because the Court erred in overruling defendant's objection and exception to Subdivision 11 of the Court's Charge as follows:

"Because the Court should confine the jury to their determination of damages to contributions in money, and should not submit to the jury other pecuniary benefits or any other elements except such monetary contributions, because there is no evidence in this record that warrants a finding or will support a finding of pecuniary benefits or benefits having a monetary value that the jury could determine in money other than the contributions of money, and the charge on the measure of damages should be confined to the element and that alone."

XXXIII

Because the Court erred in overruling defendant's objection and exception to Subdivision 11 of the Court's Charge as follows:

"To that language in said definition "And other pecuniary benefits, if any, which the evidence may show the said surviving wife and child would receive from him after the time of his death if he had continued to live; because there is no evidence in this record of any other pecuniary benefits shown to have a monetary value of evidence on which a monetary value may be assessed other than con-

tributions in money, and such charge is a charge upon the weight of the evidence and without evidence to support it."

XXXIV

Because the Court erred in overruling defendant's objection and exception to Subdivision II of the Court's Charge as follows:

"Because said charge in so far as it submits to the jury the question of such nurture, advice and training, if any, [fol. 72] as the evidence may show the child would receive from the deceased if he had continued to live, because there is no evidence that the child would have received from the deceased any nurture, advice or training of any character whatsoever, there being no testimony upon the subject; and there is no evidence that he had any qualifications or training that qualified him to render service in the way of nurture, advice or training; or such that would be of value, and there is no evidence that any nurture, advice or training that he might have given his child had any pecuniary value and if so what it was, or that it was capable of being compensated for in money."

XXXV

Because the Court erred in overruling defendant's objection and exception to Subdivision II of the Court's Charge as follows:

"Because the recovery for pecuniary benefits on the part of the wife, Mrs. Moser, is not confined to the period of her widowhood or until she may marry again, to be determined by the jury."

[fol. 73]

XXXIII

Because the Court erred in overruling plaintiff's objection and exception to the Court's Charge as follows:

"Because said charge on the measure of damages is generally too broad and not definite and specific enough and the jury should be limited in their consideration of the measure of damages, and the damages to be awarded, and should be farther and more in detail instructed as to mat-

ters they can consider, and the only way their verdict should have arrived at as more fully shown and in line with defendant's requested charges on the issue of damages."

XXXIX

Because the Court erred in overruling defendant's objection to Special Issue No. 7 as follows:

"It does not give the jury any rule or formula by which the jury may determine the amount of money that if paid now will fairly and reasonably compensate the surviving widow and child for the actual pecuniary loss."

XL

Because the Court erred in overruling defendant's objection to Special Issue No. 7 as follows:

"Because it does not confine the jury to that portion of the testimony, to-wit, the testimony offered by defendant, which affords and furnishes a basis, and the only basis shown by the testimony for determining the present monetary value of the pecuniary contributions that under the testimony the jury are entitled to consider."

XLI

Because the Court erred in overruling defendant's objection to Special Issue No. 7 as follows:

"Because the compensation is not confined as to the widow, to the period of her widowhood to be determined by the jury."

[fol. 74]

XLIII

Because the verdict of the jury is grossly excessive in its amount and unwarranted by the testimony in this:

It is for the total of $34,000.00 which at eight per cent, which the undisputed testimony shows money can be made to earn safely without risk net to the lender, will yield the plaintiffs $2,720.00 per year as long as they live and they and their representatives will still at the time of their death have the whole principal of $34,000.00, the amount of

their annual income thus provided, under the undisputed testimony will be more than Moser would probably have ever earned if he had lived and lived out his full expectancy and gotten every particle of the promotion there was any reasonable possibility of his having, and this without any allowance or deduction whatsoever for his own support and maintenance or what he would have spent on himself or loss of any time from sickness or any cause, but the verdict amounts to a guarantee to the wife and daughter of a larger income per year than Moser would have made for the next ten or fifteen years by about $900.00 per year, and for the succeeding ten or fifteen years to the extent of about $500.00 per year and allows every dollar of his earnings to them without any deduction for his support and maintenance at all.

XLIV

The verdict of the jury is grossly excessive in the amount and unwarranted by the evidence in this:

That even though the money be figured at seven per cent one per cent less than the undisputed testimony shows it can be invested at safety, it will still bring the plaintiff in an income of $2,480.00 per year during every year that they or either of them live and the principal will be intact at the end, the $2,480.00 per year being anywhere from $500.00 to $900.00 more per year than Moser had any prospect of making for twenty five years after his death and as much as there was any probability of his ever making in the latter part of his life, long after his child had come of age, if he had good luck and had gotten all the promotions he had any chance to get, and this without any allowance for [fols. 75-81] loss of time by sickness or from any other cause, making no allowance for depreciation in capacity for work by old age, and without any allowance for Moser's own support and upkeep or what he would have spent on himself or as he desired other than on his wife and child, the verdict thus guaranteeing to the widow and child a larger income for many years than Moser could make and at all times guaranteeing them against any of the ordinary and usual losses of time of human beings from sickness and other causes and guaranteeing them against any depreciation in the value of wages and guaranteeing them that

Moser would always have a job and would make as rapid advancement as was possible and still preserving for them at the end of their lives to pass to their children and heirs the full sum of the verdict, $34,000.00.

XLV

The verdict of the jury is contrary to law and the evidence and grossly excessive and unwarranted in this:

That it awards the widow and child an amount which at the low rate of six per cent, an unwarrantably low rate to be considered in this connection under the testimony in this case, would nevertheless yield to the plaintiffs $2,040.00 per year, as much or more than an average of what the evidence indicates Moser would have earned had he lived out his full expectancy and lost no time whatever from his work without any deduction for sickness or any like cause causing loss of time and without any deduction for what Moser would have spent on himself, and still at the death of the two plaintiffs the fund would be intact, guaranteeing the wife and daughter against all ordinary contingencies of life and not only so, but guaranteeing them an income of thirty three and one third to fifty per cent in excess of what they had reason to expect from deceased had he continued to live, and still preserve for them the entire principal at the time of their death to their descendants and heirs.

[fol. 82] LXXII

The jury were probably mislead to the defendant's prejudice by the improper argument and remarks of plaintiff's counsel, Mr. Curtis, in his closing argument as follows, to wit:

"But they want you to render a judgment here to a man who had a life expectancy of thirty six years, with an average earning capacity of $2,300.00 a year based on their own testimony as to the probability of his promotion, which would show an aggregate earning of more than $82,000.00 during his life expectancy, and then come here by these arguments and undertake to get you to reduce this to a judgment on a six per cent basis of $21,000.00 and then indicate they are throwing in some other things on the *sand*";

as fully shown by verified report of said counsel's argument thereto attached and by defendant's Bill of Exceptions No. A1.

LXXIII

The jury were probably misled to the defendant's prejudice by the improper argument and remarks of plaintiff's counsel, Mr. Curtis, in his closing argument as follows, to wit:

[fol. 83] "Mr. Lee says you should take into consideration here in reducing this to $21,000.00, or in an effort to get you to do it, the fact that if Mr. Moser had lived, that his wife would have owed to him her services, but that by his death, she is relieved of those services, and that therefore you should deduct from the amount of her recovery what it reasonably saved to her in the services which she would have rendered to him if he had lived. Think of that. Mr. Moser in his life time when he married this little woman, when this child came to bless their life, the service which she would and did render to him was of greater value than all that he could ever do for her, and if you were to adopt that rule, she should not receive a cent for his death, because the wife does more for the husband in this life, than the husband could ever do for the wife, but just think of a great railway lawyer in this State, representing a great railway company, coming in here and appealing to the intelligence, or to the reason of this jury and asking them to deduct from the recovery which you give to her the saving to her in the service which she would render to him."

as fully shown by verified report of said counsel's argument hereto attached and by Defendant's Bill of Exceptions No. A1.

[fol. 84] LXXVI

The jury were probably misled to the defendant's prejudice by the improper argument and remarks of plaintiff's counsel, Mr. Curtis, in his closing argument as follows, to wit:

"Now listen to it—that you in assessing damages for this woman shall assess them at such sum of money, as if paid in cash at this time will amply and justly compensate

her for the loss of the pecuniary benefits. That is the Court talking;" as fully shown by verified report of said counsel's argument hereto attached and by Defendant's Bill of Exceptions No. A 1.

[fol. 85] LXXVIII

The jury were probably misled to the defendant's prejudice by the improper argument and remarks of plaintiff's counsel, Mr. Curtis, in his closing argument as follows, to-wit:

"The testimony shows according to the figures of the Santa Fe Railway Company, that if he had lived, taking a fair estimate of these divisions of time, or taking a fair division during his life expectancy of his earnings that he would have actually received, about $82,500.00, that is based on calculations of thirty-six years at $2,500.00 a year. They say $1,800.00 and $2,050.00, and then $2,600.00, just reduce that to $2,500.00 and then multiply that by thirty-six, and you have $82,500.00. Now then counsel for the Railway Company know that it is the law, and there is nothing controlling whatever, and that the railway Company has no right to say that if we can show you will get six percent on that money that you then are limited in your right to recovery of what that six per cent would be on a basis of an annuity or the present value of that life expectancy;" as fully shown by verified report of said counsel's argument hereto attached and by Defendant's Bill of Exceptions No. A 1.

LXXIX

The jury were probably misled to the defendant's prejudice by the improper argument and remarks of plaintiff's counsel, Mr. Curtis in his closing argument as follows, to-wit:

"So the Courts take judicial notice of the fact that there can be no test, as the railway company would have the right to come into Court and say we can pay you a certain sum of money and based on five percent or four percent or six pefcent, and on the basis of your life expectancy, that is [fols. 86-88] all you are entitled to. All that the Court will permit will be for the juries to hear evidence as to the prevailing rates of interest as to life expectancies, as to

annuities, as to investment by large concerns, none of it controlling, none of it giving the right to a railway company to have it fixed that way;" as fully shown by verified report of said counsel's argument hereto attached and by Defendant's Bill of Exceptions No. A 1.

LXXX

The jury were probably misled to the defendant's prejudice by the improper argument and remarks of plaintiff's counsel Mr. Curtis, in his closing argument as follows, to-wit:

"The railway company would not have the right to say you can take this money and invest it in liberty bonds and it will make you four percent, or you can take this money and invest it in A. T. & S. F. Ry. Co. Bonds, and you will make three per cent, or take it and invest it in Union Pacific Railway bonds, and you will make four percent. They have got no right to say to you—those being guaranteed securities,—to say to you that this woman is precluded from any amount she should receive by any fixed figure of that kind, but that a jury may only hear evidence of that character, and attach to it such credit and importance as it may see fit;"

as fully shown by verified report of said counsel's argument hereto attached and by defendant's bill of exceptions No. A 1.

[fols. 89-96]

LXXXV

The jury were probably misled to the defendant's prejudice by the improper argument and remarks of plaintiff's counsel Mr. Curtis, in his closing argument as follows, to-wit:

"Now what *does* the Court advise you as to the correct measure of damages? He don't say that you shall render this on a basis of a thirty-six year life expectancy, and on the fact that he was making $2,380.00 a year, or would make $85,680.00 during his life expectancy,—that would be on the weight of the testimony. He don't say that you should allow it on the basis of three per cent or four percent or five percent because there is no such rule of pro-

cedure that controls a present and honest jury when it comes to assess the measure of damages under the correct rules of law as are shown by the charge which is to guide them in assessing those damages, but what is the chart? It is contained here in the Court's charge, it is the law of the land, it stood the test of the Supreme Court of the United States, and here is what the Court says, and here is what the Court charges you to be the law, "Regardless of what your answers may be to the questions submitted in this charge, you will assess damages, and you will arrive at the amount thereof by assessing the same at such sum of money as if paid in *cash* at this time would be sufficient to fairly compensate the surviving wife and *shild* for such pecuniary loss—what is pecuniary loss; pecuniary loss is not only the money, it is not only the money that he has given to his wife in actual cash during his lifetime, but it is the pecuniary benefits;"

as fully shown by verified report of said counsel's argument hereto attached and by defendant's Bill of Exceptions No. A 1.

[fol. 97] XCVIII

The verdict of the jury is manifestly grossly excessive in amount and unwarranted by the testimony both as to the amount awarded the wife and as to the amount awarded the child because, dispassionately and intelligently considered and eliminating the elements that the law requires to be eliminated, to wit: loss of affection, solace comfort etc., there is no reasonable basis on which the award of this jury to these plaintiffs can be justified; there is no reasonable basis for believing that either plaintiff had a prospect of contributions from the deceased or of receiving pecuniary benefits from deceased figured at a present value that could possibly have aggregated any such amount as was allowed.

XCIX

The verdict of the jury is grossly excessive in amount and unwarranted by the evidence in its award of $16,000.00 to the minor child in this:

That under standard present value tables, figuring money at only three per cent, $14,877.00 paid now would be equiva-

lent of $1,000.00 per year paid annually for twenty years (and under the court's charge twenty years was the maximum for which contributions to the minor could be figured; and figured at three and one half per cent $14,212.00 would be equivalent of a like payment of $1,000.00 per year for twenty years; and figured at four per cent, $13,590.00 would be the equivalent of $1,000.00 per year payment.

[fol. 38] Therefore the amount awarded this minor under present value tables figured at these very low rates would yield this minor $1,000.00 per year until she reached her majority, an amount at least twice as large as there was any reasonable probability of her ever receiving per year from her father had he lived and continued in good health and worked all the time and received every promotion that was possible, and no other children had been born to the family and both he and her mother had continued in the best of health so that no special drains were made on him or them by extra-ordinary expenses, and he had taken no vacations, never was sick, etc.

And if high rates of interest are taken, more nearly approximating the rates in vogue in Texas and which, under the testimony, ought to be taken, $12,462.00 is the present value of $1,000.00 yearly payment at five per cent, $11,469.00 the present value at six per cent; and $10,594.00 the value at eight per cent, which figures make more manifest and absolute the excessiveness of this verdict in favor of the minor.

C

The verdict of the jury is grossly excessive in amount and unwarranted by the evidence as to the amount awarded in favor of the wife in this:

That at the low net rate of four per cent, the present value of $1,000.00 per year annual payment for thirty six years would be $18,950.00, at four and one half per cent it would be $17,666.00; at five per cent it would be $16,564.00; at six per cent it would be $14,621.00; at seven per cent, $13,035.00, and at eight per cent it would be $11,717.00.

So it is manifest that upon a present value basis this verdict practically guarantees to Mrs. Moser an annual income of $1,000.00 for the full expectancy of said deceased Moser, when it is manifest from the evidence there was no

reasonable possibility of him contributing to her on her own account much over half that amount and certainly not more than about two thirds of that amount, at any time, and the award as made not only allows her an annual in- [fol. 99] come of from twice to three times what she had any reasonable prospect of receiving from him annually for her own account, but it guarantees to her that excessive annual income for every year of what would have been his maximum expectancy if he had been following one of the ordinary occupations of life and not the extra hazardous vocation of a brakeman; and making no allowance or deduction on account of this extra hazardous calling, and making no allowance for loss of time and earnings from sickness or vacations or rest time, but guaranteeing that he would work all the time and never miss a day; and making no allowance for the ravages of advancing years and their probable effect on his earnings not for the possibility of other children being born, decreasing the wife's expectancy; nor for the possibility and probability of decrease in scale of wages or his losing his job or having accidents or any of the other ordinary contingencies of life, and making no allowance for the value of the service she would render him had he lived and like matter; the verdict in a word not being figured on compensation at present values but in unwarranted and outside limit guarantees to the plaintiff, Mrs. Moser, of the absolute possible maximum and more that she could reasonably have expected from Mr. Moser had he been exposed to none of the vicissitudes of life that ordinary mortals are exposed to.

(3)

The verdict of the jury is grossly excessive and wholly out of proportion to any sum or amount for which the defendant is liable under the law controlling its liability and the measure of damages therefor. That the measure of the defendant's liability is fixed under the Act of Congress commonly known as the Employer's Act and thereunder could not exceed such sum as if paid in cash would fairly compensate the plaintiff for the loss sustained and the amount of such compensation is measured entirely by the contributions which had been made by the deceased for the support of the plaintiff and what would have been

such contributions during the probable life of the deceased, [fol. 100] and in determining the questions of future contributions nothing more than the earning capacity of the deceased should be considered, which earning capacity of the deceased is determined exclusively by the salary he had ordinarily received from the defendant in the capacity he was engaged at the time of his death, and as applied to future earnings and the amount of contributions therefrom that the plaintiffs might reasonably expect, the jury was not warranted in considering any element except that based upon the same average wages he was receiving at the time of his death. Measured by these standards, therefore, there was no proper evidence in this record which would no could justify the verdict that was returned. The verdict on its face shows that the jury engaged in a speculation and so speculating, as by the verdict returned, decreed such a sum to these plaintiffs, that is far in excess of any amount to which they, or either of them was entitled under the Act of Congress fixing liability for injuries resulting in death to an interstate employee by a railroad engaged in interstate commerce, and for these reasons, and each of them, defendant avers that the verdict and the amount thereof is wholly without legal evidence to sustain it.

CII

Under the Federal Employer's Liability Act, and the measure of recovery therein for injuries resulting in death, the plaintiffs were and are not entitled to any recovery which would leave a balance at the end of the life expectancy of the deceased. The defendant was liable to the deceased for the monthly wage earned by him and it can only be liable to these plaintiffs for the proportion of such monthly wage which he contributed to their support as well as some additional sum for the care, nurture and advice given to the child during its minority and during his expectancy and when this demand has been met the defendant is and was entitled to an acquittance. The verdict returned herein goes far beyond this and had in effect visited upon the defendant a punishment for an injury [fol. 101] where the element of exemplary or punitive damages did not enter. The verdict is, therefore, grossly excessive and out of proportion to defendant's liability under

the above mentioned Act of Congress and relief is herein sought against the inordinate demand as called for by the verdict.

CII.I

The evidence was to indefinite and uncertain and speculative *to* have enabled the jury to find any substancial amount, if any amount as the pecuniary value of the care and training, advice and counsel, the minor child might have received from the deceased and the verdict allowing any amount therefor, or least any substa tial amount therefor, could have been based on speculation and conjecture.

CIII

The verdict of the jury herein is wrongful to the defendant and imposes upon the defendants burden not warranted for injuries resulting in death, in that the evidence conclusively shows that based upon any earnings which the deceased had ever given for the support of the plaintiff therefrom, said verdict is grossly excessive and had no evidence based upon anything ever accomplished by the deceased to sustain the amount of it. Such verdict was, therefore, returned upon speculation and upon the assumed hope of a future increase in salary and which might never be received The evidence was and is too indefinite and uncertain, speculative and conjectural to justify the amount of the verdict on any theory of the law applicable to the evidence. The verdict is, therefore, and as to its amount, contrary to the measure of recovery as fixed by the Act of Congress and thereby the defendant has been burdened with a responsibility which has no warrant in the law and as against which the defendant is entitled to relief.

CIV

The verdict of the jury is contrary to the law and the evidence and grossly excessive in amount and shows that the jury wholly disregarded the testimony in the case and [fol. 102] particularly the testimony of the witness Anderson submitting figures on present values at all applicable to the case as made by this record, which figures condemn the verdict of the jury as grossly excessive in this:—

That assuming deceased would have contributed two thirds of his total wages to his wife and child (which is more than he would probably have contributed under the most favorable conditions), and making full allowance for all possible promotion and increase in wages that the evidence shows there was any possibility might have come to him and reducing those contributions to a present value for his full expectancy and a little more, to wit: thirty seven years, even if he had not been engaged in a hazardous occupation, the present value of the money at eight per cent (which the undisputed and uncontradicted testimony shows money can be safely made to earn without cost to the lender in Texas, and has earned for many years in the past) would be $17,446.00; and at seven per cent it would be $19,429.00; and at the rate of six per cent, the very minimum that can be justified as a basis of calculation under the record, would be $21,845.00. These amounts are manifestly excessive in themselves and are too high a judgement and award because no allowance is made for the extra hazardous occupation in which deceased was engaged, and shorter expectancy incident thereto; no allowance is made for the fact that under the charge of the Court, and under reasonable probability as well, contributions as to the minor would cease when she had obtained her majority or in twenty years at the maximum and she was not entitled to her contribution figured for thirty six years; no allowance is made for possible failure of promotion and not only failure to receive increased wages, but also the probability of decrease of wages from war time rates; nor the ordinary contingencies of life such as sickness, rest time and vacation, etc.; nor the probable increase in the size of the family if deceased had continued to live; nor for the fact that the wife and child are relieved of those services that deceased had a right to expect from them and that they [fol. 103] will in the future have the benefit of the time and exertion that would otherwise be so spent; nor the possibility or probability of the remarriage of Mrs. Moser, etc.; and an allowance of the maximum under the Anderson figures at six per cent, $21,845.00 would in itself have been a guarantee to the plaintiff that for thirty seven years two-thirds of the possible earnings of said Moser allowing for every possible promotion he could have had, every increase of wages that he could have gotten and without any diminu-

tion on account of any of the contingencies of life to which human beings are subject. In other words, a verdict for $21,845.00 can not be justified under the record in this cause, to say nothing of one for $34,000.00.

CV

It is manifest from the verdict that the jury were misled to the defendant's prejudice by the failure of the court to give the various special instructions asked on the question of damages, and manifest that the jury has not reduced the contribution to a present value nor the contributions to the child to twenty years, nor taken into consideration any of the elements in reduction of damages covered by defendant's special charges on the issue of damages, not only so, but it is manifest from the verdict that they have gone beyond compensation to the plaintiff figured at present values and have undertaken to award exemplary damages and to punish the defendant.

CVI

There has been misconduct on the part of the jury in their deliberations and the determination in this cause and their verdict herein resulting from a failure to follow the law.

That the jury did not, as the law requires, reduce or attempt to reduce the amount of probable contributions that might have been made by Moser to his wife and to his child to a present value, and did not in their deliberations and determination of their verdict consider what the amount awarded might be made to earn if placed at interest and in safe investment, as is contemplated by law, and did not calculate or undertake to calculate the value of the con-
[fols. 104-152] tributions, all of which this defendant is ready to verify by the examination of the jury.

In District Court of Bell County

[Title omitted]

Defendant's Bill of Exception C—Filed March 29, 1924

Be it Remembered that on the trial of the above entitled and numbered cause while the witness James Harrison was on the stand, and having testified on direct examination on behalf of defendant, *and having testified on direct examination on behalf of defendant*, on cross examination he was asked the following questions by counsel for plaintiff:

"Q. Do you know what the prevailing rates of interest are on government bonds?"

Whereupon the defendant by counsel objected to any proof of rates prevailing on government bonds, on the ground that the rate of interest that would control and prevail in any particular case would be the prevailing rate [fol. 154] in the particular locality, and as to this case, that prevailed in Texas and in this particular section, in Bell County and other places in Texas that might reflect the rate in Bell County. That rate of interest prevailing on government bonds or rates of interest that prevail generally over the country and which are fixed by the prevailing rates in the markets of the world are not relevent and material on the issue in this case as to what is the reasonable value of money in Texas and in this vicinity; people down here don't loan money at small rates of interest; low notes securities that are held in the east do not command sale here and their value is not a relevant and material matter in this case and the testimony is irrelevant and incompetent, and is not proper or relevant to show the reasonable value of the use of money in Texas and in this vicinity.

Whereupon counsel for plaintiff asked the witness the following question:

"Q. Do you know whether or not many people in Texas in the last few years have invested in liberty or government bonds?"

Defendant objected to said question and the witness' being permitted to answer the same for the same reasons, which objections were by the Court overruled and the witness was permitted to answer;

"A. Yes sir, I think quite a bit."

Whereupon counsel for plaintiff asked the witness the following question:

"Q. What rate of interest do gilt edge securities of that character bear?"

Whereupon counsel for defendant made the same objections to this question and to the witness' being permitted to answer the same, and further because it is not shown that the rate sought to be proved was the rate that money loans in Texas and Bell County and in adjacent counties to Bell where this money could be loaned out.

Whereupon the Court overruled said objections and the [fol. 155] witness was permitted to answer:

"A. They vary. I think about three and half from three on up to about four or — and a half and perhaps some higher."

Whereupon counsel for the plaintiff asked the witness the following question:

"Q. You are familiar with the fact that on absolute gilt edge security that can be purchased by inexperienced people safely for investment in great volume; those sums of money will loan in that manner at three and a half or four per cent?"

Whereupon defendant by counsel objected to the said question and to the witness' being permitted to answer the same on the same grounds as before stated, and further on the grounds that the question was too broad and general, and the line of inquiry had no application to this case; and the rates of interest sought to be developed were not shown in Bell County. That money is loaned in France in all probability at one per cent but that would have no relevancy in this case.

Whereupon the Court stated "You can have a full bill of exceptions on this question" and overruled the objections. Whereupon the following questions were asked the witness and answered:

"Q. You know that — is true that in large volumes in Texas and other parts of the country on gilt edge securities, it returns three and a half or four per cent?

"A. There is not as much loaned — there is more loaned at higher rates.

"Q. I am asking you if that is true?

"A. Some large investments have been made in Government bonds of course.

"Q. Don't you know that in this country now that on any large loan of real estate that you can get all the money you want at six per cent?

"A. I don't know about that. On choice business property money is had at six per cent."

[fol. 156] Whereupon the defendant by counsel urged the further objections to the said testimony so developed, on the ground that "what you can get money at is not the question; the question is what you can put it out for and what it has been put out for for years; our position is it can be loaned and safely loaned at eight per cent, and defendant objects to any testimony that some other money is loaned at less value as wholly irrelevant and immaterial."

The objections were by the Court overruled and the testimony permitted to remain before the jury, to which rulings of the Court defendant then and there excepted, and at the time objections were made excepted.

That thereafter while the witness C. E. Cizot was on the stand after having testified on direct examination in behalf of defendant as shown by the statement of facts, on cross examination the following proceedings were had, the questions being propounded by Mr. Curtis, attorney for plaintiff, and Mr. Lee being attorney for defendant:

"Q. You are a business man, are you?

A. I suppose so.

Q. And know something of the different character of investments made in this country by a man of means?

A. Yes sir.

Q. And you know that the rate of interest which is received depends upon the character of loan and the character of investment?

A. Size of the loan and the security.

Q. You know that loans which are made by the issuance of bonds for a period of time, safe and sound security and on government bonds, and on bonds of big concerns, loans of that kind are made not exceeding four per cent?

Mr. Lee: We object to that question. There isn't any issue involved in this case about rates on bonds or government security. The question in this case is what the money

[fol. 157] can be loaned at and made to bring on perfectly good security at this time.

The Court: That is the same question that you raised yesterday.

Mr. Lee: Yes, sir; and I object on the ground that it is wholly irrelevant and immaterial, and too remote, and does not apply to the conditions in the case and the facts of this case and the measure of damage in this case.

The Court: Overrule the objection.

Mr. Lee: We except.

Q. You know that is true, do you not?

A. Yes, sir."

And on recross examination the following proceedings were had:

"Q. Do you know why it is that men of great capital and means who have opportunity to invest their capital in this country prefer to put it on three and a half to four per cent interest instead of loans on town property?

Mr. Lee: We make the same objection. It is purely argumentative.

A. I don't know that they do.

Mr. Lee: I take a bill to the question and answer."

And the defendant by counsel then and there excepted to the rulings of the Court as shown.

Be it further remembered that thereafter while the witness W. W. Thomas was on the stand, and after having testified on behalf of defendant as shown by direct examination, the following proceedings were had, Mr. Lee being counsel for defendant and the questions being propounded by counsel for plaintiff:

"A. Do you know why it is that men of large capital and means in Texas and elsewhere prefer to invest their capital in 3½ and 4% securities instead of intrusting it to you to loan for them in Houston?

A. I won't admit it.

Mr. Lee: We object to it on the same grounds.

The Court: The same ruling is made as was made a while ago."

To which rulings of the Court defendant then and there excepted. That thereafter while the witness H. M. Axson-
[fols. 158-163] son was on the stand and after he had testi-

fied on behalf of defendant as shown by his direct examination, he was asked by plaintiff's counsel to make a statement of present values covering an income of $1,800 for seven years, $2,050 for sixteen years, $2,600 for fourteen years, taking the total earnings and not two thirds of it, and figuring the rate of interest at four per cent instead of the rates he had figured in the direct examination.

Whereupon defendant by counsel objected to the testimony asked for and to the witness' being permitted to answer and make the figures as asked, on the ground that there is no basis under the testimony in this case that will warrant the figuring of the rate of interest at four per cent; that there is evidence that there is a prevailing rate in this section and that money can be put out at eight per cent safely and on good security, and the attempt to prove figures at four per cent is simply injecting into the case a basis of damages and of evidence on the issue of damages that are not pertinent to the case; that are not relevant or material; that are not predicated on the proper measure of damages, and such is not the way to figure same and the testimony will simply mislead the jury as to the true facts; and further on the ground that there is no evidence in the record that the contribution would be the full earnings of the deceased.

Which objections were by the Court overruled and the witness was permitted to answer that the present values of the amounts stated figured at four per cent would be $42,416.00.

To which ruling of the Court the defendant then and there excepted, and now here tenders its bill of exception No. 6, and prays that same be allowed in terms of law and made a part of the record in this cause; which is accordingly done.

Lewis H. Jones, Judge Presiding.

(Stenographer's Record 27 25 145 147 158 and 163.)

[fol. 164] In District Court of Bell County

[Title omitted]

Defendant's Bill of Exceptions 6 Filed March 29, 1924

Be it remembered that on the trial of the above entitled and numbered cause while the witness Grazier was on the stand testifying on behalf of plaintiff he was asked by plaintiff's counsel,

Q. Can you tell the number of promotions that took place the last five or six years? (referring to promotions from the position of brakeman to the position of conductor in the service of defendant).

Whereupon defendant by counsel objected to all testimony sought to be offered at that time on the question of a promotion, or the probability or possibility of promotion of said Moser or to him, on the ground that the whole [fol. 165] matter was too remote and contingent upon too many circumstances and too many uncertainties and was too vague and indefinite and speculative to be admissible at all, and that it had already been developed by the witness that it might be nine or ten or eleven years before Mr. Moser might have been promoted, and it was not certain that he would be promoted even in that period.

Which objections were by the court overruled, and the defendant then and there excepted.

Whereupon on further examination the witness testified that there were no promotions of brakemen in 1922, and in 1921 there were ten promotions, and in 1920 there were five promotions, and in 1919 there were none.

Whereupon defendant urged the further objection to this line of interrogation of the witness and to the testimony offered that it was too vague and indefinite and involved too many uncertain matters, going back in the past and picking out particular promotions in particular years where the conditions were not shown. Whereupon the court asked "Is that the same line of service?" and the answer being Yes, the court overruled the objection and permitted the line of interrogation to continue, to which defendant then and there excepted. And thereupon the witness again testified that his records showed there were five promotions in 1920 and ten in 1921, that in 1922 there were none.

Whereupon he was asked how many conductors are carried on the roster so that if a conductor would drop out a brakeman would be promoted to conductor.

Whereupon defendant reurged its objection to this line of testimony, with the further objection that the dropping out of a conductor would be contingent upon too many circumstances and conditions and would be too vague, speculative and uncertain. The court overruled defendant's objection and the witness continued to testify that there showed to be eighty eight conductors carried on the roster of all kinds, freight and passenger.

[fol. 166] "State whether or not you keep that list and roster and whether or not it is the rule and custom of your company, the Santa Fe Railway Company, where a new position of conductor is to be created or a vacancy exists, that the first man up for promotion is entitled to it according to the rules of your company?

A. The first man in order of promotion is entitled to promotion provided he can stand the examination."

Whereupon defendant renewed its objection to the line of testimony offered on the further ground that there was no evidence that Moser could have stood the examination, and that he would have passed the same was contingent and uncertain and may not have happened, which objections were by the court overruled and the testimony objected to was permitted to stand before the jury.

That thereafter said witness, examined by plaintiff's counsel, further testified as follows:

By Mr. Curtis:

"Q. State whether or not a brakeman gets his education and experience fitting himself as a conductor?

A. A man's length of service would give him the experience for a conductor.

Q. Did you know Mr. Moser personally?

A. Yes sir, I did.

Q. Do you know his character and habits with reference to his being experienced in his line, and his faithful discharge of duty in the service of the company?

A. As far as I know, Mr. Moser was a fairly regular worker.

Q. And competent in his line?

A. Yes, sir, he was as far as I know competent as a brakeman.

Q. Are you familiar with the different rates of pay between the brakeman's position and conductor's position?

A. Not entirely familiar, but fairly familiar with some of them.

Q. What is that, what is the difference?

A. I will give it to this extent, we have what we call the local rates, the through freight and then we have the work [fol. 167] train, mixed and passenger service. Now the rates that apply to those, I can't give them off hand.

Q. Isn't it true, if a brakeman were making say $2,000.00 a year the conductor would be making about $3,000.00?

Mr. Lee: We object to the question, because it is leading, and because it don't call for what they would make, it only calls for about.

Q. Well, approximate the difference in pay between a conductor and brakeman. Of course all brakeman don't make the same, but if a man would do the same service, in other words, if Mr. Moser had been a conductor and had done the same time as he did as brakeman on the train, what wages would he get?

A. I would say probably $400.00 to $500.00 a year.

Q. Do you know the difference in the mileage they get paid?

A. Not exactly."

And defendant then and there excepted to the rulings of the court as above shown.

That thereafter on recross examination the following proceedings were had, Mr. Lee being counsel for defendant:

Q. You were asked about Conductor Boren. I understand he was employed as conductor.

A. Yes sir.

Q. Can you hire a man now in these days?

A. We have the privilege of hiring a man for every third man promoted.

Q. So you can hire men from the outside?

A. Yes, sir, we can hire men if desired.

Q. Now I will ask you to state to the jury whether promotions are as rapid in railroad service now as it was in 1913 and in 1909?

A. It is not.

Q. It is very much slower than it was then?

A. Quite a difference in the promotion.

Mr. Lee: I move to exclude all the testimony as to pro [fols. 168 & 169] motions in the light of cross examination and redirect examination on the same grounds stated before, it is too general, vague, speculative and remote and uncertain.

The Court: Overrule the motion.

Mr. Lee: We reserve a bill."

To which rulings of the court as above shown defendant then and there excepted and now here tenders its Bill of Exceptions No. 6 and prays the same may be allowed in terms of law and made a part of the record in this case, which is accordingly done.

Lewis H. Jones, Judge Presiding.

Stenographer's Record 32 33 34 36 and 52.

[File endorsement omitted.]

[fol. 170] In District Court of Bell County

[Title omitted]

Defendant's Bill of Exceptions F. Filed March 29th, 1924

Be it remembered that on the trial of the above entitled and numbered cause while the plaintiff W. J. Bassett was on the stand testifying on behalf of plaintiff, the following proceedings were had, Mr. Curtis being attorney for plaintiff and Mr. Lee being attorneys for defendant:

"Q. Do life insurance companies sell annuities based on certain rates of interest?

A. Yes, sir.

Q. What would be the cost of an annuity for $1,800 a year, for a person twenty eight years of age?

Mr. Lee: Just a minute, we object to any testimony as to what would be the cost of an annuity from a life insurance company, because it would be nothing but a purchase of insurance for so many years, and a guarantee that a

certain sum would be paid; would be a guarantee that the particular party would continue to live and be always employed and would make that much; would be in effect purchasing an insurance policy payable in annual installments, and, further, because it involves a profit to the company that would sell it and there is nothing to show how much that profit would be; and it necessarily involves a calculation of the money value of the principal sum that is to be paid for the annuity at some rate of interest but what that rate of interest is does not appear, nor whether it is the rate of interest that prevails in Bell County and adjoining counties; and because what would be required to purchase an annuity in New York as sold by an insurance company operating with large sums of money in the markets of the world is not a relevant circumstance on the question of what money is worth in Bell County, or in [fol. 171] Texas, and what it can be loaned for here; and it is all irrelevant and immaterial and misleading to the jury, and is calculated to prejudice the cause of the defendant."

Which objection was by the Court overruled.

Mr. Curtis: You may answer the question.

A. At what rate of interest?

Q. Say at four per cent ——

Mr. Lee: We make the further objection because it is predicated on a rate of interest that is not shown to be the rate of interest in this county or in this section of the state."

Which objections were by the Court overruled, whereupon the following further proceedings were had:

"The Court: Answer the question.

A. The present value of the annuity of $1.00, the first payment to be made at once, according to the combined experience and American Experience Tables of mortality at the age of twenty-eight years, would be $18.36 at four per cent.

Q. Would be how much?

A. $18.36. To arrive at the value of an annuity of $1,800, multiply $18.36 by $1,800.

Q. If you were to purchase an annuity of $2.00 a year, the $18.36 would be multiplied by $2.00?

A. Yes sir.

Q. If you would buy an annuity at $2,400,000 a year, you would multiply the 18.36 by $2,400,000?

A. Yes, sir.

Q. Mr. Lee: Your Honor understand our objection goes to these additional questions?

The Court: Yes, sir.

Q. Based on $2,000,000 a year at $18.36, that would be $36,720,000.

[fol. 172] A. Correct.

Q. That is a mere matter of calculation. 18.36 an annuity of $3,000,000 a year would be how much?

A. $55,080,000.

Mr. Lee: We object to that on the further ground that there is absolutely no basis in the record for a $3,000,000 calculation. There is no testimony that warrants any finding that he ever would have made any $3,000,000 a year. And we make this further objection to all these calculations that none are predicated upon any contributions upon the part of this man, but are predicated in so far as they have any basis in the testimony as to his gross earnings, and therefore the whole thing is irrelevant and immaterial, and not confined to the proper measure of damages.

The Court: Overrule the objection.

Mr. Curtis: I believe you state an annuity of $3,000 a year on a basis of recognized and standard tables would be $55,080,000?

A. Yes, sir.

Q. That four per cent would be the rate of interest without reference to any other charge, expense, taxation or any other charge?

A. Yes, sir.

Q. Straight mathematical calculations?

A. Yes, sir.

To all of which rulings of the court in permitting the testimony as above shown, defendant then and there excepted, and now here tenders its bill of exception No. P and prays that same be allowed in terms of law and made a part of the record in this cause; which is accordingly done.

Lewis H. Jones, Judge Presiding.

[File endorsement omitted.]

(Stenographer's Record, pp. 66-67-68.)

[fol. 173] In District Court of Bell County

[Title omitted]

Defendant's Bill of Exception XX—Filed March 29th, 1924

Be it Remembered that on the hearing of the motion and amended motion for new trial in this cause on the third day of January, 1924, defendant called and examined J. J. Miller, T. E. House, M. L. House, J. E. Hudson, J. Y. Moreland, E. W. Dunlap, R. N. Cass, R. H. Giles, and J. F. Dubose, members of the jury who sat in this case and rendered the verdict herein, in support of its motion for new trial and its second amended motion for new trial, specially in support of the CV, CVI and CVII grounds of said amended motion, and said jurors being duly sworn and examined by defendant, testified as follows:

J. J. Miller testified:

I was one of the jurors in the Moser case. On the first ballot for verdict I was for $30,000.00. As to how I arrived in my own mind at the $30,000.00, as a basis for verdict, I made calculations on what he was drawing at the time of his death, $1,800.00 a year, and I split that in two, about half for his expenses, and then I cut it down and thought $30,000.00 would be about proper.

Q. Do I understand you took his expectancy at thirty-six and multiplied that by $900?

A. Half of $1,800. That makes about $32,000.00, and I lopped it off and made it $30,000.00. That is the basis on which I arrived at that verdict. I did not figure any rate of interest on the use of money, in making that finding, and did not attempt to reduce it to its present value at all.

I could not, from what the other jurors said in the jury room, say whether they followed about the same process I did. I don't know whether they did or not. After final discussion I agreed to a verdict of $34,000.00. The jury [fol. 174] arrived at that verdict just like any other jury, had propositions coming and going, give and take propositions.

The matter of attorney's fees was mentioned but it was stopped, wouldn't let it be discussed. One man asked what

the attorney's fee would be, and someone said it would not be allowed to be discussed, and that was all that was said. I myself, did not take into consideration the matter of attorney's fees. My process was taking $1,800.00 as his earnings, as shown by the testimony, and I figured he would spend half of that on himself, and I took the other $900.00 which he would contribute to his family, and took thirty six years, his expectancy, and multiplied that together, and that netted about $32,000.00, and I lumped it off at $30,000.00. I made no attempt to reduce it to a present value.

Cross-examination:

I tried to listen to all the evidence in the case; and after hearing all the testimony I undertook as best I could under the court's charge to allow in damage what I thought the parties were entitled to receive, and I took nothing into consideration outside of the evidence in doing that.

T. E. House testified:

I was one of the jurors in the Moser trial. On the first Ballot I voted for $35,000.00 damages. As to how I arrived at that in my own mind, as I understood the charge of the Court it charged us to issue this lady a certain amount of money which would be sufficient to support her and her child, and I felt it would take that to support her for thirty six years, and a fraction over. I forgot exactly what figures were the basis of my calculation—something like $900.00 per year, allowed a little over that, something a little better than $1,000.00; it would be on a basis of $1,800 a year or a [fol. 175] little better than that possibly. I allowed the widow and child a little better than half, possibly, of what he earned. I don't know exactly how much; I never kept any record of it. I figured $1,000.00 a year for thirty six years would be $36,000.00, and I knocked it down to $35,000.00 and that is the way I arrived at my first ballot. Six jurors were for $30,000.00 and five for $40,000.00 and I was in between, $35,000.00.

I did not undertake to figure what interest the amount of money I allowed would bear; I did not understand the charge that way. I was just to find out the sum, the amount

of contribution he would probably make during the years; that was the way I understood the charge. And that is what I did in arriving at the verdict, what under the law I thought it was my duty to give her; that is the way I got at it. I finally agreed on $34,000.00; I made one change only, from $35,000.00 to $34,000.00.

I could not tell you how many ballots were taken; there were several. In between the ballots there would be a discussion among the jurors about how to arrive at the verdict. That was about the same method the other jurors were apparently using, several I know—multiplying the contribution by thirty-six years, his life expectancy, and endeavoring to arrive at a verdict in that way. Some differed as to what figure they would take as annual contribution, but everyone was using that same method as far as I know. In arriving at $34,000.00, this discussion backward and forward about what were the correct figures to use, that brought some men up and some men down, and we got at the $34,000.00 verdict in that way. As far as I was concerned, I took the annual contribution and multiplied it by thirty-six years; that is what they did also, as far as I heard and observed.

There was nothing said about attorney's fees that I recall. I was not influenced in any way by attorney's fees.

I did not undertake to use any six per cent or seven or eight per cent interest, to reduce the amount of my verdict [fol. 176] to a per cent value; I did not understand it was my duty to do so under the Court's charge.

Cross examination:

I listened attentively to all the evidence in this case, and to the Court's charge; and under the court's charge and under the testimony I undertook to give indemnities to the amount I thought plaintiffs were entitled to receive. I did not use figures, only in my head; some of the men did. I did not write down any figures and undertake through a process of mathematical calculation to arrive at the correct figure; but after listening to all the testimony and considering the court's charge I undertook to allow what I thought they were entitled to recover. I do not know what mental process each of the other jurors had in arriving at the figures and the amounts they were for.

Redirect examination:

In my own mind I figured a contribution of $1,000 for thirty six years would amount to $36,000.00 and I just knocked $1,000.00 off that and rendered $35,000 as my verdict.

M. L. House testified:

I was one of the jurors in the Moser case. On the first ballot I was for $40,000.00. I figured it would take that much to support this woman and support this child and educate this child. I figured from what Mr. Moser was drawing how much he would be able to give per year. I figured it at $1,800.00 per year he would accumulate that much money, some more than that much. I did not multiply $2,300.00 by thirty-six, the number of years. No one else on the jury, that I know of, multiplied it. I did not figure if Mr. Moser had lived how much of his earnings he would spend on himself—not half hardly, I think that his contribution would be more than $900 per year probably; I don't know that I figured what his contribution would be a year. [fol. 177] I don't remember to have heard the figures mentioned that at $1,000 for thirty-six years, his expectancy, he would have contributed $36,000.00.

I did not figure it that way at all. I figured according to the Court's charge what it would take to support this woman and educate this child.

Q. It did not make any difference with you whether he would have been able to have made that much a year or not, you just figured how much it would take to support the widow and the child?

A. Yes sir.

I did not figure how much Mr. Moser would have contributed to Mrs. Moser at all; that was not in the Court's charge. I figured Mr. Moser would have been able to have furnished them a living and educate the child.

I remember that in Mr. Curtis' argument he referred to the fact that $2,300.00 a year (an average of his earnings if he had been promoted) multiplied by thirty-six years (his life expectancy) would make $82,800.00. I did not split that half in two and just figure he would spend that amount

on himself, I did not figure that way. I figured it would take that much to support this woman and child.

I did not figure any rate of interest that $40,000.00 could be made to make, did not figure it at all. I just figured out in my own mind how much it would take to educate his daughter and take care of his wife, and added them together. I did not try to figure it down to see what she could make out of it. I did not take into consideration any earning capacity the money would bring; I just figured what it would take to support this woman and child; that is, if she had drawn from year to year out of the money that was given to her. That is the way I arrived at it.

In reaching this amount I did not hear anything said with reference to attorney's fees; attorney's fees were not mentioned as far as I know of at all.

Cross examination:

After listening to all of the testimony in the case, under [fol. 178] the court's charge as I interpreted it, I undertook according to my best judgment to allow just what I thought the plaintiff was entitled to receive, and no more. I did not undertake in coming to my conclusions, anything further than a general consideration of all the evidence in the case and the court's charge; I did not undertake by mathematical calculation to figure it out for myself. The Court did charge us that we should allow to the plaintiffs such an amount as if paid at this time would compensate for the loss they had sustained by reason of his death. That is the way I tried to arrive at it, and I thought they were entitled to $40,000.00.

There was nothing discussed by the jury outside of the evidence and the Court's charge in our deliberations, that I know of. No discussion was made of any expense to which the plaintiff would be by reason of litigation; and no discussion was made as to reaching verdict by lot or by adding up and dividing what the jurors were for by twelve. The jury was unanimous on each of the issues submitted to them in deciding each question just as they were answered except just as to the amount, and we did all that first; and every man on the jury was in favor of answering each question as it was answered and presented by the court except when we came to fixing the

amount of damages, and on the subject of amount the jury took a ballot merely; we entered into no mathematical calculations but took a ballot as to what each of us thought they were to receive. On the first ballot, without any attempt by the jury to make any mathematical calculation, each juror merely wrote down what verdict he was in favor of. Six of the jurors were for $30,000, one for $35,000, and five for $40,000. At no time did the jury enter into any mathematical calculations figuring rates of interest or the values of annuities or discuss any particular evidence along those lines, but we fixed these amounts and finally got together on $34,000.

Redirect examination:

What figures the other jurors may have made in their [fol. 179] own minds I don't know anything about. There was no figuring done in the jury room, only what I did, that I know anything about. There was one man talking a little about calculations. He reconsidered his ballot on the first ballot and decided he had it a little too high after he had studied about the matter and looked at the figures we carried with us and the Court's charge. There were a few sheets of paper that were sent up with the jury that had Mr. Moser's time on it.

No calculations were made by anybody that I know of, figuring what rate of interest money would earn and reduce it to its present value.

Recross examination:

I undertook according to the best light I had before me to return a just verdict under the evidence and the court's charge.

J. E. Hutson testified:

I was foreman of the Moser jury. On the first ballot I voted for $[illegible]. As to how I arrived at that amount in my own mind, I sorter figured on the basis of what the man was receiving at the time of his death, $1,800 per year. I do not know what his contribution would be out of the $1,800 to his family; I did not figure that; I just allowed so much for his pro rata part and I don't remember just

exactly what I allowed for that. What he expected to get is what I rendered my decision.

I thought he would give two-thirds of the $1,800 to the family, something like that; about $1,200.00 per year to the family, and I multiplied that by thirty-six, his expectancy, that is the way I kind of figured it, I don't know that it was just on that basis of figures. $1,200.00 by thirty-six years would be $43,200.00 and I just lumped it off roughly at $30,000.00. Without being accurate as to details that was the process I went through.

I don't know that I figured on about what any amount [fol. 180] of money would earn.

Q. You just figured an amount that would be put in the bank and could be drawn from year to year, considering that as his contributions of money to his family?

A. I took into consideration what he made.

Q. A sum that could be drawn out without regard to anything being put out at interest at all, which would make up what he would have been able to contribute to his family if he had lived, that is the *idea*?

A. I believe it was.

Q. You did not figure what the worth of the money was or what it would bring at interest?

A. I figured what he would have, what would be the sum of his contribution to his family for thirty-six years. I don't know that I took into consideration what that particular sum might earn at any rate of interest.

I was foreman of the jury and I heard the discussion of the jury. The process I went through, something of that kind, was about the process of all the jurors that I heard, I did not hear all of them. The jury generally were considering that same line of calculation but probably not using that same amount; the majority was finding a verdict by multiplying some sum by thirty-six and some odd years.

In the discussion after the first ballot we finally got together on $24,000.00.

I don't remember any discussion in regard to attorney's fees. I did not make any arrangements as to attorneys' fee, and as far as I know the jury did not.

Cross-examination:

I listened to all of the evidence and the court's charge as best I could, and undertook according to my best judg-

ment to return a just verdict considering that. From such impression as the evidence made on my mind I undertook to give to the plaintiffs such an amount as they were entitled to receive under the evidence. I did not go through any process of making any mathematical calculations by figures, and I don't know that any of the jurors did that. [fol. 181] When we first went out to consider our verdict we first took up the answering of the questions asked by the court, and the jurors were unanimous as to everything except the amount. When we came to the question of amount we made no mathematical calculations based on any certain figures or lines of testimony, but as jurors merely set down on a piece of paper what each one thought the plaintiffs were entitled to receive under the court's charge. That is all I know about it; and when that was done there were six members of the jury voting for $30,000, one for $35,000, and five for $40,000. We finally got together by deliberation and arrived at a total sum of $34,000, and so far as I know the jury in the jury room undertook to make no mathematical calculation or deductions according to the rules of life expectancy or annuities. There were no discussion or consideration by the jury as a whole, or by any member of the jury, to arrive at a total verdict by making mathematical calculation based on any particular line of testimony but each of us, as far as I know, were for the respective amounts, for which we stood based solely upon the evidence and the court's charge.

Recross examination:

I made no calculations to reduce the payment to its present value, and I know of no calculations being made by any members of the jury at any time with reference to any rate of interest to reduce the payment to its present value.

Redirect examination:

I knew that his total earnings, from the testimony, would have run up to more than $80,000, based on $2,500.00 a year; and I was merely trying to arrive at the present value paid in hand in cash at the time of the pecuniary loss which they had sustained, under the court's charge.

Recross examination:

I made no calculation whatever as to what money paid at [fol. 182] this might be made to earn.

There was a question asked in the jury room about attorneys' fees and objected to, but it was not discussed.

J. Y. Moreland testified:

I was on the Moser jury. On the first ballot I voted for $30,000. As to how I arrived at that, I figured it would take something like that much to give the woman and child support, of course taking into consideration the salary the man was drawing. $1,800 a year I believe was what was figured. I don't know that I went into the details and figured out how much he would contribute to his family. I considered something like $900 a year for thirty six years. I think I figured that $1,800 for thirty six years would be about $64,000.00, and cut that about half in two, something like that, and in round numbers I voted for $30,000.

After further discussion by the jury back and forth, I finally agreed to the verdict of $34,000, $4,000 more than my original estimate.

I don't know if the balance of the jury were figuring the matter the same way I was—what he contributed multiplied by thirty six. They talked on the figures that you all had made out and figured on that sum. I don't know whether they figured what that money could be made to bear interest per year and reducing it to its present valuations; I did not go into those details. I did not figure it at seven or eight per cent or any other rate that the money could be made to bear.

I remember talking to Mr. Draughon about this matter. I told him that the jury did not take into consideration interest rate or attempt to reduce the prospective of the money to its present value. The jury figured some on [fol. 183] some of the papers that were there. I don't remember whether I took into consideration the interest rate or attempt to reduce the prospective contribution that deceased might have made to its present value. I brought in my verdict on a basis that he would have made about sixty odd thousand dollars. I did not figure it in the light

of what he would give to his family out of that every year which if kept in the bank and given the same amount every year could have been given for thirty-six years. I had an idea what that money would earn—$30,000.00 a year, I knew it would earn $1,800 at six per cent. I did not figure what amount, if paid now, taking $900.00 as a basis per year, if put out at interest would absorb itself at the end of thirty-six years.

Cross-examination:

When the jury went out after listening to all the evidence and the court's charge, we first answered each of these issues and questions which the court submitted to us, and the jury was unanimous in answering each question as it was answered on the first ballot, except when we came to the amount.

When we came to the amount, instead of entering into a discussion and making mathematical calculations, each of the jurors, taking into consideration the evidence and the Court's charge merely wrote down on a piece of paper the amount which he individually thought the plaintiffs were entitled to receive, and some were for $30,000 six jurors; one for $35,000, and five for $40,000.

We took several ballots on various amounts between $30,000 and $40,000, and we finally agreed on $34,000.

The way in which I reached in my own mind what plaintiffs were entitled to receive, was that I considered the evidence relating to how much the deceased was earning and his life expectancy; and according to my figures that would run up to about $64,000, and I thought to pay this at this time a reasonable award to plaintiff and was the amount I was for. I did not take a piece of paper and do any figuring, nor did the jury as a whole arrive at its verdict by means of any such calculations. We merely arrived at a verdict by each man writing down on a piece of paper the [fol. 184] amount he was for, ranging from $30,000 to $40,000, and we finally got together and agreed on $34,000.

There was no discussion in the jury room that we should take the respective amounts, add them together and divide them by twelve to arrive at our verdict, and we did not do that. There was no discussion in the jury room that we should give to his wife and child what he would have

made in his entire life. There was no discussion in the jury room that we were to allow at this time only one-half of what he would make to his family and allow that all at this time without taking into consideration its present cash value. We merely arrived at our verdict by agreeing on $34,000 after discussing several different amounts under the testimony and under the charge of the court.

Redirect examination:

I don't know what methods of calculations the other jurors used in arriving at their verdict.

Q. You do know that the first ballot you got was the one you arrived at in the manner I have gone over with you?

A. $30,000.

The question of attorneys' fees was not discussed in the jury room; there might have been something mentioned about it. I asked some question about it myself; I believe I asked what was the amount usually paid, something like that. There was nothing else said about it. I did not consider that the widow would have to pay attorney's fees in determining my verdict.

E. W. Dunlap testified:

I was one of the Moser jurors. On the first ballot I was for $30,000 verdict. As to how I arrived at that amount in my own mind as a proper amount, I just figured that it would about take that to do what the judge said for us to [fol. 185] do. The charge said to give her a sufficient amount of damage to educate the child and support Mrs. Moser, and that is what I undertook to do when I first thought of $30,000 as my vote Mr. Moser's earnings and what he would make did not have anything to do with it. I might have made some calculations in my mind as to how much he might be able to contribute to her; I don't know that I remember now just how I did figure that.

I did not make any calculation of the amount he would contribute each year and multiply that by his expectancy. I did not at that time undertake or try to reduce annual payments of so much per year by means of contributions each year to a present value by figuring how much money

that money could be made to make. I did not figure that at six per cent or seven or eight per cent or any other per cent; and I did not make any effort to reduce the payment for thirty-six years, his expectancy, to a present value at all.

Cross-examination:

I heard the evidence that was offered, and after hearing and considering it according to my best understanding I undertook to allow as damages such an amount as I thought plaintiffs were justly entitled to receive. I cannot at this time undertake to recall the exact words of the charge, but I heard it, and we had it with us, and I undertook to be guided by it; and under the court's charge and the evidence I was for $30,000.

Every member of the jury voted unanimously in answer to every question submitted except on the question of amount, and when we came to that we voted it verbally. I voted for $30,000 and so did five others; one voted for $25,000, and five voted for $40,000. We did not even write down our respective amounts on paper.

Q. And you arrived at your verdict by taking into consideration what the man was earning and what he would probably earn during the remainder of his life and what would justly compensate these plaintiffs for the loss sustained by his death, under the court's charge?

A. Now, in arriving at the $30,000 the charge did not say anything about taking into consideration what this man was earning or about what he would earn, as well as I re- [fol. 186] member about it, the charge just said to give her enough damages to educate the child and take care of Mrs. Moser. That may not be the words, but I think that is the substance of the charge. * * * I understood we should take into consideration what he was earning and should pay them at this time what would justly compensate them for the pecuniary loss they had sustained. I did not undertake to give to them what I thought he would contribute to them during his entire life if he had lived, but to pay them at this time what would justly compensate them for the loss they had sustained.

Redirect examination:

I did not undertake to reduce the amount that I would give them to the present value or figure interest on it at all. I made no such calculation as that and did not try to do it.

Those tables that were used in evidence were up there, but we did not find them *some little but* after we were in the jury room. As to whether any such calculations were made by any juror, I don't know about that. There might have been one made, but I did not make any. As to others I don't know about that; all that I can say is what I did.

Recross-examination:

Q. In other words, after hearing all of the evidence and the Court's charge, you thought they were entitled to receive $30,000 and voted for that, and you undertook to make no particular mathematical calculations yourself?

A. No, sir.

R. N. Cass testified:

I was one of the jurors in the Moser case. On the first ballot I was for $30,000. As to how I arrived at that amount, it would be a little hard to say. You lawyers each thought we ought to find this and the other for that, and we tried to make it fair for both and make it a decision.

Q. Just took an average between Mr. Curtis on one side [fol. 187] and Mr. Hair and I on the other?

A. That had some weight.

We figured on what Mr. Moser was earning; we figured on how much Mr. Moser would make in thirty-six years, his expectancy. You remember you lawyers figured how much that would come to and made these figures and we had them. We did consider how much he might have contributed each year to his wife and child, and as near as I remember it, multiplied that by thirty-six years that he had to live. I don't know that I at any time figured on that money as to what it would earn so as to reduce it to a present value; I did not make any calculation at interest at eight per cent or six or seven per cent. I made no attempt to reduce the payment paid annually to a present value—to

calculate how much if paid now would amount to the same as a payment made each year at a given rate of interest.

Q. You made no such calculation as this insurance man made on the stand, you did not try to do it?

A. The others figured it and I tried to keep up with it as best I could. Interest was mentioned, all right; I don't remember that I saw any calculations made on any rate of interest.

I think I heard the matter of attorneys' fees mentioned in the jury room once, and then it was hushed up at once.

Cross examination:

After listening to all the testimony and the Court's charge, according to my best judgment I was of the opinion that these plaintiffs were entitled to receive $30,000 on my first ballot, merely taking into consideration the evidence as I had heard it and the impression it had made on my mind. I figured that under the Court's charge they were entitled to receive what I voted for on my first ballot. I did not undertake to make mathematical calculations. I am not very good at figures, and I did not attempt it; I don't suppose I could have done it if I had tried, in a scientific way.

The jury when it came to vote on the question of the amount took a ballot, each juror took a vote and gave the amount which he was in favor of allowing; and there were [illegible] six for $30,000, one for $35,000, and five for $40,000. We took other ballots, and finally agreed on $34,000 [illegible].

As far as I know there was no misunderstanding of the jury in anyway, or misconduct of the jury, or any discussion of any improper matters.

E. H. Gates testified:

I was one of the jurors in the Moser case. On the first ballot I was for $40,000. As to how I arrived at $40,000 I just figured it would take that much to maintain this woman and educate that child. I believe the man would have done it, had he lived.

I remember Mr. Curtis' statement and argument that

$2,300.00 per year was an average of his salary, and for thirty-six years would amount to $82,500.00.

I did not take any amount of contribution and multiply it by thirty-six in arriving at any amount he might receive. My verdict was a kind of an estimate of what I thought it would take. The charge of the court was that we would give this woman an amount that would maintain her and this child, and that is what we undertook to do. I considered that he would have contributed to his family about half of his income anyway, and multiplying that by thirty-six would be something around $40,000, more than that; that is about the way I figured it in my mind. Wasn't anything said about interest, and I did not attempt to reduce it to a present valuation.

I don't know anything about what is the usual attorneys' fees in a case of this kind. I did not take into consideration the attorneys' fees the widow would have to pay; I did not think about it. I did not tell Mr. Draughon that I was sure that a number of the jurors considered the attorneys' fees in arriving at the verdict. I did not make any such statement as that.

Cross-examination:

[fol. 189] I listened to all the evidence in this case and undertook according to my best judgment to return a verdict under the evidence and the court's charge which would be a just verdict. As far as I know there was no misconduct of the jury or any discussion of improper matters. After hearing this evidence and considering it all according to my best understanding I was for $40,000. I did not undertake to say in my mind that because he probably would make $80,000 or more during his lifetime that she would be entitled to receive that all now; I was merely undertaking to give his wife and child that amount that would compensate them for his death, for their pecuniary loss, as the court charged us.

J. F. Duncan testified:

I was one of the jurors in the Moser case. On the original ballot I was for $40,000 I believe. As to how I arrived at that, I just had an idea it would take that much to keep Mrs. Moser and the child up.

I did make calculations in my head; the charge says that we were to do that and I believe Mrs. Moser, the way the present living was, that it would take $40,000 to keep Mrs. Moser and the little girl up and educate the girl. That is the way I arrived at it as near as I can tell you now.

I did not figure any interest because the charge did not say so. I don't believe I did figure any interest. I figured it was like this: that it was Mrs. Moser's business after the money was paid to her to do as she pleased with it and I thought if she wanted to put it out at interest it was her business, the charge said to give her in a lump what was to keep her up and that child, that is the way I understood it. I made no allowance as to what that money could be made to earn; I did not consider it that way.

[fol. 190] Cross-examination:

I listened to all the testimony that was offered by plaintiff and defendant. I heard the testimony as to the probable life expectancy, and the testimony as to his earnings, what he had made in the past and what he would probably make in the future.

Q. According to your best judgment, of course you don't recall the exact words of the court's charge, but if the court charged you that you should allow to Mrs. Moser at this time such an amount in damages as if paid at this time would justly compensate her for the pecuniary loss sustained by her at the time of his death, is that what you tried to do?

A. I tried to do according to the court's charge.

I did not hear any discussion of the jurors as to any mathematical calculations that were made by which they undertook to figure rate of interest of life expectancy or annuities or anything like that; if it was discussed I did not hear it.

After the jury retired to deliberate on the case all the questions submitted by the court were answered unanimously except the last question, the question of damages; and when we came to that I believe the jury voted six for $30,000 one for $35,000, and five for $40,000. After deliberating together and taking votes on other amounts we finally agreed to give her $34,000.

As far as I know there was no misconduct of the jury or any discussion of any improper matters.

And said testimony in said motion having been considered by the court, said motion is in all things overruled, to which ruling of the Court the defendant then and there excepted, and here now tenders this its Bill of Exception No. XX and prays that it be allowed in terms of law, which is accordingly done.

Lewis H. Jones, Judge Presiding.

[File endorsement omitted.]

[fols. 191-232] [File endorsement omitted]

In District Court of Bell County

[Title omitted]

Order Overruling Motion for New Trial. Filed January 3, 1924

This day coming on to be heard the defendant's amended motion for a new trial filed January 3, 1924, and amended original motion for new trial filed herein on the 10th day of December, 1923, the amended motion having been filed with leave of the Court, and the testimony of the jurors offered in support thereof being considered by the Court, the said motion was in all things overruled, to which ruling of the Court, the defendant in open Court excepted and gave notice of appeal to the Honorable Court of Civil Appeals for the Third Supreme Judicial District at Austin. And on motion of defendant for good cause shown, ninety days from and after this date is allowed to parties for the filing of statement of facts and bills of exception.

Lewis H. Jones, Judge 27th Judicial District of Texas.

[fols. 233-235] Clerk's certificate to foregoing manuscript omitted in printing.

[fol. 236] In District Court of Bell County

[Title omitted]

Statement of Facts—Filed in District Court March 29, 1923, in Court of Civil Appeals April 3, 1924

Caption

Be it remembered that on the trial of the above entitled and numbered cause, at the October Term of the District Court of Bell County, Texas, A. D. 1923, the following testimony was offered and the facts presented, and none other, towit:

Mrs. Olena Moser, administratrix, in her own behalf testified:

I was the wife of John H. Moser. We were married October 4, 1918; he was then working for the Santa Fe as brakeman and had been about five years.

He was killed April 23, 1923.

He left home about noon on the day of his death to go out on thirty seven to Belville Yards. Mr. Francis was conductor of the train.

I heard he had been hurt about six o'clock in the afternoon, and that he was dead about seven.

When off duty Mr. Moser was in the habit of staying at home. He loved his baby and loved to take her around, and loved to stay at home and help me.

He had no bad habits.

When off duty in Temple he always stayed at home with the baby. He was always called at home.

There was delivered to me what was supposed to be a part of the door that my husband went through when he fell through the car; the portion handed me was made of some kind of metal; it was very rusty, worn away.

It was given to me in Valera by some trainman; if I remember right it was Mr. Ferguson, or he gave it to someone who gave it to me.

(Witness is handed photograph, Exhibit No. A of the car involved, taken after the accident, and at this point photographs Exhibits A and B and C were offered in evidence and exhibited to the jury).

[fols. 237 & 238] Mr. Moser and I had one child, the baby here, Mary Virginia. At the time of her father's death she was a little over seventeen months; she is about two years old now.

At the time of Mr. Moser's death he was twenty-eight years old; I was twenty seven, and we resided at Temple.

Cross examination:

I was raised in Bosque County at Clifton; my father is Mr. C. O. Nelson; he runs a hotel at Clifton, and has been running it about twelve years I reckon. My mother is living, and I have two own brothers and two half brothers living; two of them live in Clifton, one is a small boy at home with mother, younger than I, and the older one is working there in town; he is now about thirty two. One of the other brothers lives at home and the other lives in Oklahoma. He is working on a salary.

I have two sisters living, older than I, married and living away from home.

I am a graduate of the public schools at Clifton, have no other education outside of that.

While growing up I assisted slightly my father and mother in running the hotel, working about the hotel; helped some. I was not very strong and was not able to do very much.

I spent the time at the hotel prior to the time I was married; was married in 1919.

Mr. Moser was born in Lometa and raised out on the western branch of the Santa Fe. He had just had a public school education, had gone through the public schools at Valera.

My age is just past twenty seven.

[fol. 238a] James Harrison, for defendant, by agreement was put on the stand out of order and testified as follows:

Resided in Fort Worth; was formerly vice president of State National Bank which was afterwards consolidated with Fort Worth National.

For the last fifteen years has been in the loan brokerage business and real estate, at that time had loaned approxi-

mately two million dollars original and renewed loans; eight (fol. 239) per cent had been the prevailing rate. I do not remember but one loan less than that; some few were placed at more than that, ten per cent, a very few. These loans were placed on real estate at about fifty per cent of the fair conservative price of the real estate. As to whether those loans were safely placed, I have only had one foreclosure in the notes I have handled, and that was $2,500 and the owner of the note was offered $3,000 after the foreclosure proceedings; there has been no loss whatever; none whatever.

The borrower has invariably paid the expense of the loan, examination of title, recording fees of all papers, and all expenses whatever, and the eight per cent was net to the lender. I have been placing loans under those conditions for fifteen years. I can place all I can get now at those figures, within a reasonable time; a man of course could not go out and place it on the spur of the moment. That is my business; I am doing that right along in Fort Worth.

Cross-examination:

I am of the partnership of Gilvin & Harrison and have been for the last six years.

I loan for customers and clients; among them is the endowment fund of the Texas Christian University.

I think I have been fairly successful and skilful in the money loaning business over my fifteen years' experience.

It requires experience and skill to safely handle money in reasonable amounts.

Q. You know that it is true that in large volumes in Texas and other parts of the country on gilt-edged securities, money returns 5% or 4%?

A. There is not as much loaned there is more loaned at higher rates.

Q. I am asking you if that is true?

A. Some large investments have been made in government bonds of course.

Q. Don't you know that in this country now that on any large loan of real estate that you can get all the money you want at six per cent?

A. I don't know about that. On choice business property money is had at six per cent.

I don't understand that the state and county tax rate is the same in all counties. I really don't know what the state tax rate is.

Redirect examination:

I have stated that it does take some experience to handle loans of the kind I have talked about safely.

Of course a person would have to have an idea of the value of real estate on which they make loans and the purpose is to loan about fifty per cent of the market value of real estate, and there is very seldom any losses. In placing this money for people who give me money to invest I give them the benefit of my judgment and experience in placing these loans and in protecting them and placing them; that [fols. 240-244a] is what I sell them; but it is paid for by the borrower; I give them the benefit of my experience in protecting them and that is without cost to them, and they get eight per cent net for their money.

There are other brokers in Fort Worth that do the same thing; I think the prevailing brokerage rate is two per cent which is paid by the seller.

Recross examination:

That is two per cent of the loan paid by the borrower.

Offer in Evidence

Plaintiff here offered in evidence letters of administration issued to Mrs. Moser in the probate court of Bell County, showing her appointment as administratrix of the estate of John H. Moser.

Agreement of Facts

It was at this point in open court agreed by and between the parties to this case that at the time of his death Mr. John H. Moser was in the employ of Gulf Colorado & Santa Fe Railway Company as a brakeman on a train en route from Temple to Bellville, which train carried interstate freight

and interstate commerce, and that the defendant was at that time engaged in interstate commerce as a carrier, and that the deceased Moser at the time he received his injuries resulting in his death was in the performance of his duties relating to interstate commerce.

Offer in Evidence

Defendant at this point tendered to counsel for plaintiff a tabulated statement covering the earnings of Mr. J. H. Moser from the time he entered defendant's service as a brakeman, and up to the time of his death, representing and agreeing that the same was full and correct; and plaintiff then and there introduced such statement in evidence, and the same is here now offered in evidence by plaintiff. Mr. Moser's gross earnings are shown in the column headed "Total," being the sum of the items shown in column headed "Deduct" and "Net amount pay check" the deductions having been made from the pay checks because of deductions for hospital and for other accounts paid out by defendant on the order of Mr. Moser.

[fol. 245] C. C. Gossett for plaintiff testified:

That he had a roster of conductors on the southern division of the Santa Fe Railroad.

At the time of Mr. Moster's death on the 23rd of April, 1923, I count twenty six men ahead of Mr. Moser for promotion, he was the twenty seventh man out for promotion. According to my experience as to about how many men are promoted annually, there have been period of lapses of nine or ten or eleven years before any promotions have taken place. There were no promotions in 1922. In 1921 there were ten promotions. In 1920 five promotions. In 1919 there were none; no promotions in 1919.

Off hand I could not tell you how many brakemen there were on that roster.

On a rough count I find eighty eight conductors are carried on this roster of conductors; I may have missed one or two but it shows to be eighty eight (this includes freight and passenger conductors.

The first man in order for promotion is entitled to promotion where there is a vacancy in the position of conductor, that is the first brakeman, provided he can stand the examination. A man's length of service would give him experience for conductor.

I knew Mr. John H. Moser personally.

As far as I know he was a fairly regular worker, as far as I know competent as a brakeman.

I am not entirely familiar with the different rates of pay between the brakeman's position and the conductor's position but fairly familiar with some of them. I will give the difference to this extent: We have what we call rates on locals, on through freight, and then we have the work trains, mixed and passenger service. Now the rates that apply to these I cannot give them off-hand.

If Mr. Moser had been a conductor today working the same time as he did as brakeman on the train I would say his wages would probably be $400 to $500 more per year than as brakeman. I don't know the difference in mileage exactly that they get paid.

Cross examination:

At the time of Mr. Moser's death there were twenty-seven men ahead of him for promotion; he was the twenty-seventh man up for promotion.

It is true that promotion does not take place by any regular rule; no regularity whatever. The conditions upon which it depends vary right along. It is also true that the railroads are constantly using larger engines and larger trains that result in the movement of fewer trains, and this results in decrease of men needed. Then as larger equipment and larger power are used for economical use of railroads the chance of promotion for a particular man becomes less and less and becomes more remote.

At the time of Mr. Moser's death we had more men pro- [fol. 246] moted at that time than we needed.

Since April, 1923, we have made three promotions.

I have been connected with the trainmaster's office of the Santa Fe Railroad about fifteen or sixteen years and I am pretty familiar with that situation.

Mr. Moser stands on the roster as entering the service as brakeman on December 7, 1915; and at the time of his death that would be about six years or a little better. Taking into consideration the time he had been in the service the earliest probable time that Mr. Moser would have been in line for promotion considering the conditions, in my judgment it would probably have been six or seven years or better before he would have been eligible for promotion, and then he would have had to stand an examination; he would have to. And this being promoted does not mean necessarily that he is going to commence running a train as conductor; for a good long time after he was promoted he would very seldom run a train as conductor; he would run one occasionally. He would be on the extra board and would still retain his rights as brakeman and the bulk of his work would be performed as brakeman. In the promotion of a man from brakeman to conductor the estimate is made as to how many men will probably be needed for the service. We sometimes overstep ourselves reaching out and getting more men than we need. When a man passes this examination he is placed on the roster as emergency conductor to be used in emergency as conductor when needed. This man will be called upon if he is the oldest man available at the terminal to avail himself to run the train over the road. This would probably occur once in a great while in his early service as conductor, probably more often as conductor as time goes on. This man as brakeman would still perform brakeman's service and his promotion to conductor would not interfere whatever in the performance in his capacity as brakeman. The bulk of his work in the early years of his service after promotion, as stated before, would be as brakeman. We keep a list of men who have had the requisite experience and take them up and examine them and they are placed on the conductor roster.

The business of the railroad varies; sometimes in the summertime and parts of the year we have very little freight moving, and during the fall in the heavy cotton movement or wheat movement we will have a large amount of freight movement. Then we have extra tonnage and we will need emergency brakemen, and they are put in charge of trains according to seniority, emergency conductors. Same rule applies to brakemen. As matter of fact when a

man is working for the railroad as brakeman in the early years of his service he has a whole lot of idle time; plenty of it. That gets less as he goes along.

Judging from past experience, in my judgment Mr. Moser would not likely have had a regular run as conductor for fifteen to seventeen years from the time he was set up as conductor and placed on the roster; that would be fifteen to seventeen years.

It is my estimate that after six or seven years, it is my estimate that it would be in the neighborhood of twenty-three years from the time of his death before he would have a regular run as conductor. The best runs are the passenger runs.

The probability of Mr. Moser ever getting to be a passenger conductor would be very vague, small chance, for the reason that promotion, as before stated, is slow, due to the increase in power or, larger engines, the more cars we haul, and the more cars we haul per engine the less trains we run, and the less trains we run the less men we use; and the probability of a man reaching promotion now as they did years back is very remote. It would be at least twenty-three [fol. 247] years before Mr. Moser would receive a regular run as conductor, and that would be through freight or chain gang service, that is the class of service the new men have to take in view of the fact that the older men take the best runs like locals. Taking those figures Mr. Moser would have been a very old man if he ever reached a job as passenger conductor.

As to how long it has been since a man was advanced to passenger conductor on the Santa Fe Southern Division, where Mr. Moser worked, Conductor Lingo, promoted to be conductor December 15, 1898, was the last man promoted to be passenger conductor. Of course that does not give you the time he actually entered the service and I could not give you that date.

Mr. Lingo probably at one time held a job as extra passenger conductor, and he might have held a regular job as passenger conductor during a time when a man was laying off and until he was re instated. Mr. Lingo has been holding a job as regular passenger conductor about four years. He was promoted in 1898 to be conductor.

If I could correctly — there are 191 men on the roster between the man next to be in line for regular passenger work and Mr. Moser.

In my judgment there was not any reasonable probability of Mr. Moser ever reaching a passenger run.

As stated, at the end of six or seven years he might have been up for promotion as conductor and being promoted would give him the opportunity of running as conductor whenever he got picked up on the extra list; and the first year he might make a trip or two, and the next year some more trips, and as time went on gradually increase, and the balance of his time he would have his rights as brakeman and run as brakeman and get pay as brakeman. In my judgment ten years after Mr. Moser would have been promoted to be conductor, that is ten years after six or seven years from now — after he had been a conductor for ten years, and predicated on the present scale of wages, the ones prevailing now, taking into consideration the previous performance of other men for that length of time, I will state that the reasonable earnings of a man at that time would be between $2,100.00 and $2,200.00 per year. I am sure that it would be ten years after he had reached that period of earning capacity before he would get a regular run. It would be anywhere up to fifteen years or may be better before he would get the regular run; that is an estimate.

The maximum that he would reasonably expect to reach before he got a regular run, if he was operating as brakeman and conductor I will state about $2,200 to $2,250 before the fifteenth year.

As to what he would get if he had a regular run in the chain gang — extra as conductor, that would vary with the amount he laid off; if he was a steady worker it would run from $2,500 to $2,700 taking the entire year into consideration.

If everything were all right with him then, for some twenty five or thirty years, twenty or twenty five years from the time of his death, he might get up to $2,500 or probably a little better; that is based on my knowledge of what other men have done. It is true that there is a very great fluctuation in the amount that the men make. Business fluctuations, some men hold up better and keep better health, and some men are more steady workers than others.

Some have more sickness and fall down. What I have stated is the maximum reasonably probable with a man [fol. 248] that works fairly steady; those figures I have stated in my estimation are approximately correct.

The year 1920, as to the character of business that was done by the road in that year, we have a large business, a portion of that time was the largest business we had done; and the rates of pay in force at that time were the largest rates of pay ever in force on the railroads in the United States to my knowledge; that was during 1920 and 1921, and were the rates of pay established by the railroad administration, and those rates prevailed when the roads were turned back to the owners and until the labor board reduced them in July, 1921. I could not tell the exact figures of the reduction at that time.

From May, 1920, to June, 1921, was the highest rate of pay ever paid in this country.

The men out on the road pay their own expenses; the more they run of course the more their expenses. They have hospital charges to pay, deducted from their salary, small amount—$1.00 or $1.25 a month, whatever it is.

Redirect examination:

There have been three promotions of brakemen since April, 1923, the last one July 18, 1923, W. T. Field. He was hired in 1913, July 7, promoted July 18, 1923, lacking a few days of being ten years; so the last man promoted from brakeman to the position of conductor it took approximately ten years from the time he entered service to become a conductor.

Mr. Moser entered the service as brakeman December 7, 1915, so if he were promoted within the same time the last man was promoted, if all the conditions prevailed, he would be promoted two years from now to the position of conductor. Taking the last man up, taking the actual test on that, the last man promoted, if Mr. Moser would receive his promotion in the same length of time it would be two years from now, if you use the same figures. Then he would act as extra conductor only at such time as no other preferred man was at the terminal.

A man is not a regular conductor until he gets a regular run. The last man holding at the present time a regular

job as conductor, that is the last man promoted, was Conductor Boren. He was the last man promoted, holding a job as conductor now. There are other men promoted down here not eligible to the regular run simply because there are not enough cars on; there are other men promoted to that position.

Anyway he, Boren, would be the youngest man as conductor, holding a regular run at the present time. He was hired as conductor in 1909, hired him straight out. That was J. Boren. He is a freight conductor.

We had at the time about twelve or thirteen men on the regular passenger service in the Southern division. We had eight men in the local service; three men in mixed service; eight men in preferred service running through freight jobs, and seventeen men in chain gang service; those men are regular; that is approximately correct.

We are at the present time carrying three extra conductors. They do the extra freight work. Those men stay in terminal and protect the board whenever a regular man lays off either on local or through freight.

[fol. 249] That is what we call the extra board; that is set apart. There is nothing irregular about running but it is regular in so far as position is concerned.

There were forty nine men in what I call regular positions.

As I count it there are forty three other conductors in service that act as brakemen also. Some of those do very little braking service and some who have just been promoted do very little service as conductors, some that have been here fifteen years holding jobs as conductor, doing about fifty-fifty in the service as conductor and brakeman.

A man who is promoted to the position of conductor for the first year makes very little more than a regular brakeman, gradually increases as the years go by.

Recross-examination

The forty three extra conductors that I counted are not in regular runs at all. There are approximately that. Now the last man who has been promoted is Mr. Fields.

There were twenty three men between Mr. Fields, who would go up for promotion on that brakeman's list, ahead of Mr. Moser, after Fields, at that time; that did not in

clude Mr. Moser. Adding the twenty-three brakeman to the forty three extra conductors there would be sixty-six conductors and brakemen ahead of Mr. Moser without any regular run that would have to be provided for and gotten out of the way before Mr. Moser would have had a chance for a regular run; that is what the record indicates.

Fields was promoted on the 18th day of July, 1923; then there was a man promoted June 7, 1923, and one promoted June 10, 1923. The roster shows that the three last men have been promoted are the only men who have been promoted for conductors since August 4, 1921. Three men in a fraction less than two years, and there are twenty-three men still ahead of Mr. Moser before he could be promoted.

Redirect examination:

I did state there were ten men promoted in 1921 and five in 1920, making eighteen promoted in the last three years.

Recross-examination:

Conductor Boren was employed as conductor.

We have the privilege of hiring men for every third man promoted, so we can hire men from the outside if desired.

Promotions in the railroad service is not as rapid now as it was in 1909 and 1913. There is quite a difference in promotions since then.

(Tol. 260) J. F. Frances, for plaintiff, testified:

That he is a conductor in the employ of the Santa Fe Railroad, and was conductor on the train at the time Mr. Moser met his death on the 23rd of April, 1923. There were two brakmen on the train, the other was named Baldridge. Baldridge was head brakeman, and as such was stationed at the head end, and the hind brakeman, Mr. Moser, was on the hind end.

I did not know anything about Mr. Moser's death at the time it happened. The last time I saw him, I took it to be him, about fifteen or sixteen cars from the rear end of the train coming up Lyon's Hill going south; he was walking, coming toward the engine from the rear end of the

train, working toward the front; I took it to be him. I would say that was about a mile from the station; about a mile before we got to Lyons, and Mr. Moser's death happened, as I understand, three or four hundred yards after we passed the station at Lyons, so we had probably travelled from the time I last saw Moser until he was killed a little over a mile, probably a mile and a quarter or mile and a half.

When we whistled for Lyons I looked at my watch and we were a little ahead of time, and I got down on the engine and told the engineer we were a little ahead of time, and he said we would kill a little time and be up by the time we got to the switch. We did not stop at the station. We were running very slow, killing time. We were due there about 4.55 and it was 4.53 above the station when I spoke to the engineer and the engineer told me by the time we passed the south switch the time would be up.

It was three or four minutes from the last time I saw Moser until he fell from the train I suppose, I don't know when he fell.

The last time I saw him he was probably fifteen or sixteen cars from the caboose. I don't know what time he fell off. Judging from where they found him it must have been pretty close to five o'clock, probably 4.59, along in there. We were running very slow. I never saw him after his death.

As far as I know, no one on the train knew of the accident until after we got to Somerville, some three or four miles beyond the place of the accident, when we got there he was missing; another train crew went back and got his body I think. I saw the car with the jutes in it and the hole in the floor through which he fell. I did not inspect that car before the accident. I am not a car inspector. If I was passing by and seen anything out of the way I would have inspected it. We stop for inspection at different places. The brakemen inspect the train, at different places we have regular car inspectors, and we inspect trains too at divers places, stop for inspection.

I have been a conductor over twenty years, had been a conductor on other roads before my service with the Santa Fe, and I broke for a while before I first came to the Santa Fe, was a brakeman about a year and a half.

I think brakemen get 4.45 per hundred, and conductors

get 5.80 a hundred miles in chain gang service; I get 5.80 per hundred.

I don't know what a regular conductor who hasn't a regular run gets per mile. I don't know what the pay is. If there were extra men on my run I suppose they would get the same pay that I do.

[fol. 251] Cross-examination:

It is a brakeman's duty to look out for anything out of the ordinary, anything defective, watch out for it. We have inspection stations on my run at Cameron and Caldwell. It is a brakeman's duty to keep an eye out and look out for the train—anything that is dangerous for the train or any body else.

Mrs. N. A. Stevens, for plaintiff, testified:

That she knew John H. Moore in his lifetime; had known him for ten years; knew him well; know him to be a good man, devoted father and husband, and a man who loved his family.

W. J. Bassett, for plaintiff, testified:

That he lived at Temple and was in the life insurance business, and had been engaged in that business over twenty-seven years, and was now connected with the Southwestern Life Insurance Company. That he was familiar with life and expectancy tables, had some with him.

Cross-examination for the purpose of an exception:

Insurance companies do make a different rate on men engaged in the service of a railroad brakeman; it is considered a hazardous occupation; most of the companies who accept freight brakemen, take the general expectancy at premium of the standard risk and add to it what is called an occupational extra premium.

It may be that there are shown by my tables companies who add a certain number of years to the age of the man engaged in a dangerous occupation and then take the rate of that age—it is not shown by this table. I have not seen

in this volume that I have, it stated that some of the companies add seven years to the age of a brakeman and figure his expectancy as that of a man seven years older than he is; I don't know whether that is correct or not; I am not familiar with it.

Direct examination (cont'd):

The life expectancy of a man twenty eight years of age under the American Experience table is 26.73 years; according to the Combined Actuaries table 35.86 years. The average of those two tables would make it an excess of 36 years.

This table presumes the expectancy of life of a given number of persons taken at the age of twenty eight without respect to their physical condition, their sex or their occupations.

I got that information from my service in connection with this character of business during the past quarter of a century.

(61 262) Cross-examination for the purpose of an exception:

I did not read that from the book. I got that information from my service in connection with this character of business during the past quarter of a century. No, sir, that table is not made up only from accepted risks from insurance companies. This Experience Table is not made up by the Insurance companies on their accepted risks and from no other sources; the American Experience Table is not made up from accepted risks. As to how I know, just the same answer I gave a moment ago, from my experience in this business for twenty five years. That table was made up before I ever went into business. As to how I know how that table was made up, it was made up from 1000 lives taken at the beginning at the age of ten without reference to occupation because at the age of ten they had no occupation. Yes, sir, someone has told me that, that is the basis of the American Table. That is correct, someone told me that.

Redirect examination:

The American Experience Table is the average length of time that all will live at the age of twenty eight.

Annuity means in the life insurance sense the amount of money to be paid annually to a person during their life time; that is what is known in life insurance as an annuity. Life insurance companies sell annuities based on certain rates of interest.

The cost of an annuity of $1,800 a year for a person twenty eight years of age at four per cent, the present value of an annuity of one dollar, the first payment to be made at once, according to the combined experience of American Experience Tables of Mortality at the age of twenty eight years would be $18.36, at four per cent, and to arrive at the value of an annuity of $1,800 multiply $18.36 by $1,800, and if you were to buy an annuity of $2,400 a year you would multiply 18.36 by 2,400. Based on $2,000 a year the present cost of an annuity would be $36,720, and on $3,000 a year would be $55,080.

That four per cent would be the rate of interest without reference to any other charge, expense, taxation, or any other charge; straight mathematical calculation.

C. E. Hinton, for plaintiff, testified:

That he lived in Belton and represented the Southwestern Life Insurance Company, and also Loan Association, and had been in the insurance business about twenty years. Had heard the testimony of Mr. Bassett as to the authority from which he was testifying.

The American Table or Mortality is used by all insurance companies as far as I know. We have probably the books of fifteen or twenty insurance companies, different companies, and they all use the same tables.

The life expectancy of a man twenty eight years of age is 30.73.

(Tol. 2 61) I am not familiar with annuities.

By expectancy is meant that the average man will have that many more years to live added on to the twenty eight.

Cross-examination:

What I am testifying from is called the American Experience Table of Mortality.

All the information we have about this matter is gotten out of books. I did not start it. My information in regard to whether this covers all people of twenty-eight years or only accepted risks, is just what is in the book.

E. E. Bateman, for plaintiff, testified:

That he was brakeman on the train at the time Mr. Moser met his death.

The rate of pay received by a brakeman in the service in which he and Mr. Moser were engaged was $1.48 for one hundred miles. That he had been extra conductor since the first day of April, 1907, part of his service was that of brakeman and part that of conductor.

As to the proportion of time in the last two years he had served as brakeman and the portion as conductor, there has been little as conductor in that period, would not average a trip a month; most of his work had been as brakeman.

The last time I saw Mr. Moser I think was just about even with the station at Lyons; at that time he was sitting on top of the car, on a refrigerator car just behind the car with the oil well pipe in it. I would judge it was that car; so if he fell through the floor of the car loaded with oil well pipe he had gotten up from where I last saw him and moved forward to the next car.

We were going to set out some cars at Somerville, Bellville was the end of our run.

The cars to be set out at Somerville where I believe all cars ahead of this car of pipe. Somerville was not the destination of this car of pipe. According to my recollection it went on through to Galveston. The cut out of cars to be made at Somerville was just ahead of that car of pipe.

I dont know why the car was left there at Somerville on that occasion unless it was bad order; probably cut out on account of bad order after the accident.

I saw the car after the accident; saw the floor in it.

(The piece of metal that was testified to by Mrs. Moser was shown to the witness.)

I could not tell about this piece of metal. This resembles a part of the floor. It is similar to the floor of the floor of [fols. 254 & 255] the car where the hole was. It is similar in appearance and character to the floor which the man went through; that is some parts of it.

I don't know what kind of metal it is composed of; I don't know whether it was iron or steel, steel I would think; I don't know what kind of composition it is. I did not go back to the scene of the accident; went on to Bellville that evening; never saw Mr. Moser any more.

I did not miss him until our arrival at Somerville; don't remember which of our crew missed him first unless it was me.

I possibly had known him eight or ten years, and what work I have had with him he was a very competent brakeman. I would hardly know whether he was a man that stayed on duty and worked regularly or laid off; as far as I know he worked regularly; I never knew him to lay off. As far as I know he was a man of good habits; I never know anything else.

I did not know his whole life of course, I don't know what attention he paid to his child and his home; only when I would see him out with his child somewhere, meet him sometimes; I would see him taking care of the child, attentive to her.

Cross examination.

I was promoted to conductor in 1911; that is ten years ago; I do very little running as conductor, work almost entirely as brakeman still.

I do not undertake to say that the piece handed me was a piece of the floor of that car.

Redirect examination.

I have stated that the piece of iron handed me was similar in appearance to some portions of the floor of the car [illegible] the hole; that is the metal looks of the same character.

Re-cross examination:

The metal looks the same.

Q. What portion do you mean? You say "some portion." Explain what you mean to the jury so that they will have all the facts.

A. Cars of that type, the steel floor.

I say that it looks like the type of steel floor generally, that is of the old cars. Some portions of them look that way, while others might be a little heavier than that, but that shows it was worn from rust. That is the type of floor of cars of that particular type of car. That Pennsylvania car, that kind of metal is common to them.

[fol. 256] Mrs. Ottie Moser, recalled in her own behalf, testified:

In response to question by Mr. Lee I said my father was living; 78 years old.

Mr. Moser did not contribute anything of his earnings to any other person than myself and my child. He spent his earnings upon his family.

Cross examination:

Mr. Moser did not send his father money from time to time; not in our married life, we needed it ourselves. He was not able to do anything for his father, in fact his father had helped us when we were first married.

His father is 64, lives at Valera, has a very small farm; his mother is living out there too.

We were married since 1919, and he gave nothing to his father during that time.

Plaintiff rested.

[fol. 257] Ed Temple, for defendant, testified:

That he is in the employ of the Santa Fe Railway Company as conductor and lives in Temple and has lived there for over forty years, and for about twenty years has been putting out money at interest. That he had gotten for his money from eight to ten per cent, and had loaned it out at those rates.

That he got real estate as security, safe security. The party borrowing the money paid the expenses.

That he had been doing this for twenty years; that he was doing it at the time of the trial; had no difficulty in putting it out at any time he wanted to. He put it out for others and helped them to put it out.

Cross examination:

I render my notes for taxes and pay the taxes.

I don't know what the city tax rate is. I think it is about $2.80. I don't know the state and County tax rate. I think it is approximately $1.50, about that.

BEN STANTON, for defendant, testified:

That he lives in Temple, Texas, working for Cameron Lumber Yard there as manager.

Cameron & Company in connection with their business have for sale and sell vendor's lien notes on new residences and city property, and have been doing that there in Temple ever since he has been there—since 1919; for the last four years. Has been with the firm at other places and the same practice has prevailed.

Up until the time the war came on we kept all that paper ourselves, because we considered it a good investment, but after the war it took so much more money to run our business, that we decided to discontinue that practice and what paper we have had since that time we have had it for sale.

The rate of interest was eight per cent, that is what people who took it over from us got. The party who gets the money pays the expenses incident to the examination of title, passing on the loan, brokerage fees, etc. The eight per cent is net to the lender. The security is mechanics or materialman's first lien on the house or property at approximately fifty per cent valuation of the property. The security of those loans is the very best of security.

{fol. 258} E. T. Kennas, by deposition, for defendant, testified:

That he is a resident of Philadelphia, and is superintendent of Car Service for the Pennsylvania Railroad System, and that part of his duties in January, February and March, 1923, were to keep a record of all cars moving over the Pennsylvania Railroad System and the record of all such cars while away from that line; that he did not personally keep these records, nor were they kept under his personal supervision, but under the personal supervision of an assistant Chief clerk; that they were accurately kept from day to day from original reports from conductors in charge of trains and from agents in charge of interchange points.

That his records show that Pennsylvania car 288751 was at Elmira, N. Y. empty on January 1st, 1923, at which point it stood until January 22nd, when it was placed in shops at the above mentioned point empty and was turned out of shops the same day. That the car left Elmira empty on January 23rd and was placed at the New Alexandria Colliery #3 January 27th, from which point it was loaded on January 29th to Ogdensburg, N. Y., and that it was delivered to the New York Central at Himrods Junction February 7th and by the New York Central to the Rutland Railroad February 12th. That his records do not show the date the car arrived at destination, nor the date it was released from the load, which information is disclosed only by the records of the Rutland Railroad. That the car was returned empty from the Rutland Railroad to the New York Central Railroad February 20th and by the New York Central to the Pennsylvania Railroad at Wallington, N. Y., February 28th, from which point it was moved empty and placed at Lilley Mine near Brownsville, Pa., March 11th, from which mine it was loaded on March 12th to the Youngstown Sheet & Tube Company, Youngstown, Ohio, with 87,800 pounds of coal, at which point it arrived March 14th. That the car was loaded from Youngstown, Ohio, March 21st to Apollo, Pa., at which point the car was made empty and left Apollo March 27th for Pittsburgh, South Side, at which point it was delivered to the Monongahela Connecting Railroad March 28th. That on March 31st car was delivered by the

Monongahela Connecting Railroad to the Pittsburgh & Lake Erie Railroad, on April 1st by the Pittsburgh and Lake Erie to the Pittsburgh, Chartiers & Youghiogheny, on April 7th by the Pittsburgh, Chartiers & Youghiogheny Railroad to the Pittsburgh & Lake Erie Railroad, on April 12th by the Pittsburgh & Lake Erie Railroad to the New York Central Railroad, on April 17th by the New York Central Railroad to the Indiana Harbor Belt Railroad, on April 18th by the Indiana Harbor Belt Railroad to the Atchison, Topeka & Santa Fe Railway, and on April 22nd by the Atchison, Topeka & Santa Fe Railway to the Gulf, Colorado & Santa Fe. * * * That to the best of his knowledge all the commodities transported in this car were loaded on the floor of said car and that there is nothing in his records to indicate that the car failed to sustain the commodities with which it was loaded.

(Cross-examination:)

That he made no personal inspection of any cars on the Pennsylvania Railroad System. That he personally did not keep said records, but that said records were kept under the direct supervision of an Assistant Chief Clerk and as these records were made currently from original reports, he has every reason to believe that such records were correctly kept and that the records furnished showing the movement of this car are correct in every detail. That he does not have any personal recollection or knowledge as to Pennsylvania car 288761 during the months of January, February and March, 1923, except such information as is disclosed by records kept under his supervision. That he did not see said car. That he did not personally inspect said car. That [fols. 200 & 201] he has no personal knowledge as to its movements, as to the commodity with which it was loaded and that he can testify only as to the records kept by him, which records reflect the information furnished by others.

[fol. 201] M. W. G. Hileman, by deposition, for defendant, testified:

That he was foreman of the Neville Island Pipe Yards of the Frick and Lindsay Company in 1923; that the company shipped in April, 1923 on an average of about one

carload of pipe a day; that he would oversee the loading of the pipe on the cars so far as necessary; would pay particular attention to the quantity put on the car.

If I have old hands working for me they do the loading and I do not have to bother much with it outside of seeing that the proper quantity is placed on the car. If, however, there are new hands loading I tell them how much goes on and how to put it in the cars. Of course there is never a whole new crew. So long as there are one or two old ones there I would not bother. If I have old ones I put them on the car and they know how it is done.

I always have four men and one crane man, and of course the crane men do not belong to my crew only when loading pipe. The pipe is placed on the car by crane.

In loading a car there are two men, one at each end of the pipe in the car. They place the pipe in such manner so they will not be coupled and they take the hooks out of the pipe. Two men are placed on the car with the pipe and the crane men operate the crane in moving the pipe from the pile to the car. If any stakes are necessary any of the men place the stakes in position.

I keep a record of the pipe loaded by the company; from these records it appears that Pennsylvania Railroad car 288751 was loaded with 10-inch pipe, I think, at Frick and Lindsay Yards at Neville Island on April 7, 1923; the length of the pipe I don't remember but the pipe are usually estimated at an average length of twenty feet. The shipment was loaded for Texas.

The car was received from Pittsburgh, Chartiers and Youghiogheny Railroad. I do not inspect cars as they are supposed to be in good condition for loading when they come in; and I do not make a practice of looking at the cars set for loading of pipe, and I am not in position to state the condition of Pennsylvania Railroad Car No. 288751 at the time it was loaded at Frick and Lindsay Yards, but in all probability if there were holes large enough in the floor through which a man might fall, my attention would in all probability have been called to it, but I have no recollection of my attention being called to any such holes.

Within the past six or eight weeks three pictures were shown me which were supposed to be the picture of the Pennsylvania Railroad Car No. 288751, with a load of

pipe on it. I looked at the pictures and the pictures did show a hole in one end of said car. There were no such holes in said Pennsylvania Railroad Car No. 288751 at the time of the loading at Frick and Lindsay Yards on April 7th, 1923, as shown in said pictures, otherwise my attention would probably have been called to same.

In loading cars with pipe there would be two men, one on each end, and probably there would be two, maybe three or four, men in putting up braces to keep the pipes from rolling off the car when they get up above the siding. These pipes were put in the middle of the car, according to the [fol. 262] picture, and the men would be at either end of the car seeing that the pipe was properly piled up. The men would also walk from side to side at the ends of the car as the pipe was being loaded.

Cross examination:

I cannot state definitely how many cars of pipe were loaded by Frick and Lindsay Company at their Neville Island Pipe Yards, because in the moving of the Yards from the Fravo Contracting Company property to the new location of the Frick and Lindsay Pipe Yards, the records became mixed up.

I have no personal recollection or knowledge as to the loading of each car of pipe. I do not remember particularly the loading of Pennsylvania Railroad Car 288751 during the month of April, 1923, but from the records kept know that said car was loaded.

I have no personal recollection of having made any particular inspection of Pennsylvania Railroad Car No. 288751.

I have no personal recollection at this time as to any particular inspection that was made of said car No. 288751. I only know that men in loading the car would walk over the floor at either end thereof. I am testifying from records and recollection and the practice of the men in loading said cars.

It was not my duty to inspect or examine the cars. I am not a car inspector. I am not familiar with the duties of a car inspector.

It is true that I do not make any personal examination of the cars but assume them to be in serviceable condition when turned over by the Railroad Company, and it is true

that I have no personal knowledge and no personal recollection as to the condition of Pennsylvania Railroad Car No. 288751.

I do not undertake to state positively at this time I have personal knowledge and recollection of the condition of the floor of the car.

I did not make an inspection of the car or the floor thereof.

[fol. 263] RAMSEY, for defendant, testified:

That he is a freight conductor in the service of the G. C. & S. F. Railway Company, and has been since 1905. That about the 22nd of April, 1923, he handled Penn. car 288 751, and from his train book (which he held before him) he could testify that he handled said car from Shawnee, Oklahoma, to Gainesville, Texas. The G. C. & S. F. Ry. connects with the A., T. & S. F. Railway at Gulf Junction. That he had no personal recollection of the car in question whatever. That his attention was first called to the car about the 20th or 22nd of November, after this accident happened, and that he had no recollection at that time about the car personally at all.

That it is customary for conductors and brakemen to pass backward and forward on the train when it is in motion, but does not remember whether he had passed over that train on that trip or not; that if he did he has no recollection of it. That if he had passed over that train and there had been any holes in that car that were dangerous for train men walking over them he could probably have noticed them walking backward and forward, and if he had noticed them he would have made a note of it and made a report of it. That it is part of the duty of a brakeman to look out for anything of that kind.

Cross-examination:

I have seen a picture of the floor of the car—the picture offered in evidence; it shows apparently the worn, rusted and eroded condition of the floor. With most of these Pennsylvania cars there is a solid steel runner right through the center of the car and quite a few of them have trap doors for the purpose of unloading coal through the center of

the car and the floor rests upon this center piece here and also upon the sides—there is a heavy piece of steel there. I see one of these cross pieces in the picture—two of them.

I would estimate that it is something like three and a half or four feet from the center of the car to the sides. From one of the crosspieces, from one side of the car to the other, to another cross piece, would be about the same distance; the blocks or spaces made by the cross pieces and center piece may be two or two and a half feet across; I would not be positive; the picture would indicate it was something like two and a half feet.

In other words, this sheet floor would rest upon strong steel pieces and it would be in squares or blocks something like three and a half feet one way and two and a half feet the other. Looking at this picture it appears that the front part of this hole turned down or broken off almost straight across even with the frame it rests upon, and looking to the rear it seems to have broken some six or eight inches to the front; it is broken; I can't testify by looking at this picture at this time whether that is an old break there or not, or whether it is merely a new break as it went down from the front.

I never saw the car.

Looking to the extreme left hand side of the car as the car is facing you in the picture you can also see the holes rusted and worn through there. Looking to the center as it rested upon its support there and just along from the iron support it is resting upon, there you see also it is worn [fol 264] through there; and just opposite that on the other side you see where the same is rusted through the entire lengths as shown in the picture; and also you can see the same over to the right side of the car, and you can see a place rusted through across the face of the sheet on the other side and in next to that support.

If I had seen that flooring to have been in that condition before this large hole was pressed in there I would have reported the car. As to whether it was not a safe car to be on the road in that condition, lots of times a car will get in that condition and you have got to unload it and bill it home for repairs; you can expect all those trap doors to be in bad shape on those cars; no doubt if the company knew the car was in that shape they would have made different arrangements with it.

Redirect examination.

(Witness points out in the picture under the edge of the car the outline of the trap door or about where it would be located.)

I don't say this car has any trap door, you understand; this is where the trap door seems to be (indicates).

As indicated by the picture the trap door is under the pipe and comes up to about this point (a little beyond the pipe).

That black spot in the direction of and toward the end of the pipe looks like it is the depression for the trap door, and the pipe extends practically over the trap door, just enough that you can look back under the pipe and see where it may be.

(At this point counsel for defendant stated that there is no contention in this case that the trap door was anywhere where anybody could fall into it.)

The trap door is not very clear in one of these pictures but you can see it clearly in the other. I see the piece of the floor hanging down under the car and the white scratch across it.

"(Witness then at this point locates before the jury about the edge of the trap door.)

I have seen this picture of the car with the hole in it, and I have seen the picture taken of the car from the outside with the flap down under the side of the car. If I had passed by and seen that flap hanging under the car I would have made a record of it, if I had seen that big hole; that would not have escaped my attention.

Recross examination.

This trap door is in a "V" shape and is opened by a chain, and when it is opened it leaves the bottom of the car open; it is only supposed to be open when they are unloading coal or coke, and at all other times it is closed.

(Statement by counsel for defendant: There is no controversy in this case that the trap door had anything to do with the accident. There is a shadow in the picture and we were just explaining about that shadow. It is not claimed that the trap door had anything to do with the accident.)

[fol. 265] About fifty miles of the run from Shawnee to Gainesville is on the A. T. & S. F., until we get down to Gulf

Junction, and eighty three miles is on the G., C. & S. F. That is my regular run. *The* is my regular run. The Santa Fe has a car inspector at Gainesville supposed to inspect all cars coming through, and the A., T. & S. F. has them at Shawnee; and then there is a car inspector at Cleburne and one at Temple.

So this car had evidently passed all those inspectors coming out of Temple, and these men are specially employed to inspect all cars and their equipment coming through; that is their special duty.

At this time it was admitted that Mr. Moser's train crew only took charge of that train and this car at Temple, and it was coming on to Bellville, and Moser had no connection with it until it was ready to leave Temple.

J. R. Rison, for defendant, testified:

That he is a brakeman working for the G., C. & S. F. Railway Company. That he had check up the records and found he was with the witness Conductor Barrett on the run from Shawnee to Gainesville April 22, 1923. Did not keep any record himself of the run; could not recall what cars were in the train; had no recollection of Pennsylvania car 288751. On the run he would have occasion to go backward and forward on the train.

My attention was not called to car having handled this car April 22, 1923, until some time in October, and then I had no personal recollection about the matter.

If I had gone back over the train and found a car the floor of which I thought was in an unsafe condition it was my duty to report it. The other brakeman was B. F. Hammonds; he is dead.

Cross-examination:

When our train crew goes down to the yards at a terminal and find an engine and train lined up ready to go, which has been inspected by the regular inspectors appointed by the company, we assume that that train is safe to go out on and we do not undertake to make an inspection of it, nothing only the handbrakes, and we expect that train to be safe

for us to ride on, and expect it to have been inspected by our car inspector.

(At this point it was stated by defendant that there was no controversy made that the trainmen had the primary right to assume that the train was in a safe condition.)

[fol. 266] Sylvester Dean, for defendant, testified:

That he is freight conductor on the Santa Fe, and from his train book (which he had before him) he knew that he had handled Pennsylvania Car 288751 on April 22, 1923; that after that date his attention had been called to the fact he had handled the car some ten days or two weeks before he testified, and that he did not have any independent recollection about that car at all at the time of the trial, and could not tell the jury anything about its condition. That his records showed that he handled that car from Gainesville to Cleburne. In making that run he might have had occasion to pass over the train while in motion; he did not often pass over the trains but his brakemen occasionally did when necessity demanded it.

If he had passed over that train and noticed any defect in the floor which he regarded as dangerous he would have reported it; there would have been a report made of it. That he had no recollection about this car at this time, and all that he knew was that he had it in his train at that time.

D. H. Maymus, for defendant, testified:

That he is a brakeman in the employ of G., C. & S. F. Railway Company, and had looked the matter up from Conductor Dean's train book and knew that he was with Conductor Dean as brakeman on the trip on April 22, 1923. That he had no recollection of this Pennsylvania car at all; that his attention had only recently been called to the fact that he had made that trip, that at this time he had no recollection about the car whatever.

As a brakeman it becomes my duty from time to time to pass backward and forward over the train, do that some-

times; do not recollect whether I had any occasion to do so on this trip or not.

In passing backward and forward it is my duty to keep my eye out for any defective condition that I might notice about the cars. If I had noticed any defective condition in going backward and forward on this trip that was dangerous to the men on the road it was my duty to have reported it and I would have done so. The other brakeman on that train was Mr. Cann who was recently hurt in an accident.

[fol. 267] Cross-examination:

We inspect hot boxes and drawbars after we get out on the road, and if we were to get out on the road and a defect would appear in any of the machinery it would be my duty to look after it, but I assume it is all in good shape in starting; unless I notice some defect I assume it is all right.

Redirect examination:

Everybody in train service on the Santa Fe is supposed to watch out for any trouble on the train.

E. R. Hooks, for defendant, testified:

That he is car inspector for G., C. & S. F. Railway Company, located at Dougherty, Oklahoma, which is south of Gulf Junction. That in April, 1923, he was working at Gainesville as car inspector, and from his books he is able to testify that he assisted in inspecting Penn. car 288751 in April, 1923; at the time it was in Train 37; inspection made just after the train got in; was assisted by Ed. Hunter and A. C. Anderson.

I climbed on top and went over the length of the train and also inspected the sides partly. The other men worked on the ground. I was the man who went on top of the train.

I have seen the picture of this Pennsylvania car offered in evidence before. As to whether that large hole was shown in this picture was in that car at the time I inspected it at Gainesville, I could not be positive but if it had been there I believe I would have seen it and had ordered the car; I don't believe it was there.

As to the smaller holes shown along there in the picture running along about the middle of the car, some holes, the hole on the left of the picture and some over to the right side of it, they could have been there possibly when I inspected it, those cracks.

I don't bad order those steel bottom cars for those cracks because there are quite a few that have cracks but that bottom is supposed to be steel; that class of cars have got a metal bottom and there are quite a lot of them cracked and it don't mean the bottom will give way because there are cracks there. It is supported underneath, and lots of those cars have cracks running along the side and the bottom and cracked at the end at all. I exercise my judgment on the floor as to whether it is safe for a man to pass on it and pass it on that condition. I have no recollection of passing this particular car.

I can state what my practice was and what the regular rules were, but I could not say I looked at the floor of this particular car when it passed through here at that time; I did have a method of inspection and it is my purpose to examine the top to see if the roof was safe, and I inspected the floors as I came to them and I only passed them when the were in my judgment safe.

[illegible] Cross-examination.

I have no personal recollection of ever having seen that car, and I am testifying only from the records.

As far as my memory is concerned I have no more recollection of that car than I have of any other car that I may have inspected out of the great number of them that may have passed through for months and months. It was our orders and the duty of the car inspectors to go over these cars and inspect them for safety. I cannot positively say whether this particular car had holes in it when I inspected it or not. But if it had had the hole, according to all my practice in bad ordering cars I would have had ordered it.

If I had observed the floor of that car and had seen an unsafe condition to have been there I would have had ordered the car and would have reported it. I can only testify from my record as to whether I did actually see it or not, and my records do not show to what extent I inspected the floor of that particular car.

Redirect examination:

If I had found anything the matter with that car in that inspection my records would have shown it.

I cannot go on personal recollection as to this car; all I can go on is the regular rule, and the regular rule was to go on top of the cars and inspect everything; that was my duty and I performed my duty and I saw nothing about the car that caused me to make a note of it, and if there had been anything out of the way it would have been in this book.

Recross-examination:

If I did not make a note of it the boss would jack me up, and he hasn't jacked me up yet. The train was standing still and the car was in it when I inspected it.

A. L. Hooks, for defendant, testified:

That he is conductor in the employ of the C. & N. W. Railway Company. From inspection of his train book he knew that he had handled Pennsylvania car 28851 from Cicero to Temple. That he heard of the accident to Mr. Moser the same day that it happened, and thereafter while the matter was still fresh in his mind he looked in his train book to see if he had had this particular car, and found that he did have this particular car in Temple; that the matter was brought to his mind sufficiently close to the happening of the accident for him to be able to tell the jury whether he had passed over that train from Cicero to Temple, and to tell them that he did.

I remember passing over this coal car loaded with pipe between Morgan and Meridian. I passed over it by passing around the rail of the car from the north end to the south end, the rim of the car, and holding to the pipe and stakes and walking from the end of the pipe on the rail of the [fol. 203] car, on the rim which was about four inches wide; this was a distance of about six feet that I would have to step here on the top of the side.

As conductor of the train it was part of my duty to watch out and notice anything out of order about the train and any defect in it.

I never noticed anything particularly about that car as I passed over it that attracted my attention as being dangerous or anything of that kind. If there had been anything out of order that came to my attention I would have reported it. I would have noticed if there had been holes in this car like the one shown in the picture here with the flap broken down, hanging down, like is shown in this picture. I don't think that hole was there in this car at the time I passed over it; if it had been there I probably would have noticed it.

Cross-examination

I don't particularly remember whether or not I noticed the floor of this car and yet I do remember particularly of passing over the car and my manner of doing so. As to whether I remember whether I looked at the floor or not, I probably did but I don't remember whether I did or not. I am not sure that I noticed the bottom of the car. If there had been a hole in it of the size of the hole shown in the picture I would have noticed it though, I think. When I got on my train as conductor the train had been inspected and made up and brought out, and I got on it without inspecting it, relying on the fact it had been properly inspected and is safe to be out on the road, and still relying on that fact although I passed over that car I did not make any particular inspection of the floor.

A. L. Sparks, for defendant, testified:

That he is a brakeman in the employ of Santa Fe Railroad, had just heard Mr. Hughes testify. I was brakeman with him on that trip and heard of the accident to Mr. Moser that evening. I came in with Mr. Hughes on the day Mr. Moser was killed. My attention was called to the accident on my trip from Colorado down shortly after the accident to Mr. Moser, and being so called I can now tell the jury whether I passed over that train between Colorado and Temple on that trip April 25, 1923. I believe I remember going over it twice coming up Morgan Hill and coming up to Manhattan north of Crawford. I don't remember whether it was a Pennsylvania car or not. The

car shown in the picture offered in evidence looks like the car we had. It was loaded with pipe in that way. I remember passing over the car loaded with pipe; the car I passed over was about fifteen cars from the caboose; don't remember any other car in the train being loaded with pipe.

As best I remember, I got down on the floor of that car loaded with pipe. I swung down and put my toes in the end of those pipes and went down the pipe, as well as I remember, and then got off on the floor and walked to the end of the car.

It was my duty if I had noticed anything wrong with the train or dangerous to it, to have reported it to the conductor.

[fol. 270] As I passed over that car I don't remember of seeing anything wrong about it, nothing about it that impressed me as making a condition of danger.

Cross-examination.

Q. You did not inspect the floor?

A. I did not see any holes in it, and I did not stop to make any inspection. I don't remember seeing anything wrong with the car; I probably did look at the floor; I don't remember whether I did or not. I remember going over the car and down in it, and the reason I remember is that I was called on for a statement about it afterwards. As to whether there was anything particularly to impress upon my mind in passing over that car, inspecting the floor and seeing if it was all right, I don't remember seeing anything wrong with the car.

I heard about the death of Mr. Moser shortly after it occurred; the fellows told me he fell off a coal car; some fellow told me that. I did not hear about him falling through the floor of a car, not at that particular time. When I learned that he fell through the car for sure was when I made out the statement, that was shortly after it happened. I was told he jumped off a coal car, and when the claim agent had me up there for a statement he told me about it. I did not hear the day of Mr. Moser's death that he had fallen through the floor of the car, and there was nothing until I did hear that to impress on my mind the fact that I had passed over the car that had a defective floor in it through. Mr. Moser had fallen.

Redirect examination:

The statement that I gave shows to be dated April 30, and I heard at that time that Mr. Moser had apparently gone through the floor of the car; this was seven days after the accident.

I remember that car of pipe, and remember my going down on the floor crossing over the car of pipe.

C. H. Tinnin, for defendant testified:

That he is a car inspector in the employ of the Santa Fe Railroad and remembers the occasion on the 23rd of April, 1923, on which Mr. John Moser met his death between Lyons and Somerville.

I inspected that car in Somerville Yards shortly after the accident, possibly an hour, somewhere about that time, after the accident; they wired in and notified us to make inspection of that car on arrival at Somerville. It was a short time after the accident that inspection was made. We inspected the car as soon as it got to Somerville. In the inspection we discovered a hole in the car.

The car shown in the pictures offered in evidence and here shown to me is the car in question. This picture of the car correctly reflects the condition of the floor and the flap in the floor at that time. The break in the car floor was part old and part new. I saw the metal of which the floor of the car was composed.

(fol. 274) (The piece of metal introduced by plaintiff and given to Mrs. Moser as having been taken out of this floor, testified to by her, was here shown to the witness.)

I don't think the piece of metal now shown me came out of that floor. It is too thin. It is iron and the deck of that car was steel.

I made a test in examining that car to see the strength of the steel. I got hold of this piece below the deck of the car, the flap that had gone down, and tried to pull it up and couldn't pull it any distance at all. I never could get it to come back and stay back. I never could bring it up anyways near the original position. It was that degree of strength that I could not put it back into place with my hands.

The size of the opening in the floor was about two and a half by three feet and a half; the three and a half distance running across the car.

I did not see any floor in that car as thin as this piece shown me; none the size; possibly a little piece an inch back from the edges might have been as thin as that where it has been eaten out by rust; nothing any such width as the piece handed me, nowhere in the car I saw.

About eight inches of that flap, the piece that was broken down up next to the pipe was new break; there was about eight inches of new break, of solid steel, on the end next the pipe that was holding; that would indicate that that steel was solid and sound at that point.

As to whether considering what I saw of the break and the condition of that steel and the floor it looked reasonable to me that the weight of a man would have broken it, I don't think so; except for the fact that a man had gone through it I would not have thought that a man stepping on it would have broken it; it did not look reasonable to me; it looked like it would have held; I would have thought it would have held. Except for that break in the car and hole in that car I would have passed the car. First of all there was not hole enough in it (outside of the big hole) to justly holding up a load in transit; aside from the big hole those other holes indicated in the car were not of a character to indicate they were dangerous to men passing over it.

Cross-examination:

I am still with the Santa Fe as car inspector.

From the center of about the center of the car, extreme right hand side of the break next to the pipe back to the north side of the car or east side of the car is three and a half feet; that was about forty inches long, and with the exception of eight inches there was no new break whatever on that side of the hole; the other was all old break; had entirely rusted through.

I see the hole in the picture; it is rusted along there; rust had eaten through the floor at the point indicated.

That car was set out at Somerville in bad order. That piece of floor that had gone through was all in one piece; I left the piece of flooring on the car, I didn't bother with

it; the car was had ordered and unloaded. I don't think the bottom was repaired there; I don't think they could do it there; they possibly put a board over the bottom there before they sent that car back on the road.

[fol. 272] I did not take that piece out and save it; I don't know when that was finally taken off; I had nothing further to do with it. I did not preserve any part of the floor, and I have no part of it here.

Redirect examination:

I saw the floor and was specially told to examine it.

Recross examination:

I did not receive a telegram to inspect the car; the foreman received the message to inspect the car. I think that was before the car arrived, I am not sure now. I did not see the message; the foreman came to and he had the message, something in his hand, and told myself and Mr. Gaines that he wanted us to make inspection of a car on its arrival in Somerville. The train was there but it had not been set out. The train had just come, just pulled up there but the cars destined to Somerville had not yet been set out. I can't tell you whether or not the message came from Temple; I don't know where the message came from and I did not ask the foreman.

Redirect examination:

As matter of fact I don't know whether it was sent before or after the train got to Somerville on which Mr. Moser got hurt.

[fol. 273] C. C. Dickson, for defendant, testified:

That he handles the pay rolls at the superintendent's office of the G., C. & S. F. Railway Company at Temple, that is he did until the 1st of July, 1923.

I am familiar with the wages of trainmen; the rates at which they are paid. There were different rates of wages at different times in effect for trainmen from about 1919 to April 23, and from 1915 to December 31, 1917, there was no change in the rates, and the mileage rate for brakemen during that period was 2.28 per 100.

What we call the freight mileage rate for that period was 2.28 per 100 for brakemen.

Then for the period from January 1, 1918, to January 1, 1919, the rate was 3.88 per 100 miles.

General Order No. 727 covered an increase given the trainmen after the railroad administration took the roads over; after they took the roads over they raised the rate, and they raised the rate that had been 2.78 per 100 miles to 3.38 per 100 miles; raised it 1.10 per 100 miles; the local rate which had been $124.10 was raised to $171.60; and the work train rate which had been $75.95 per month was raised to $117.16 per month.

Then from January 1, 1919, until May 1, 1920, there was another scale of rates made, and the rate for brakemen for freight train service was 4.08 per 100 miles. That was under Supplement No. 15. That rate was 1.30 per 100 higher than the 2.75 rate and under that order salaries were abolished and everything was put on a mileage basis, and the local rate per mile was made 4.76 per 100, and for mixed trains 4.71 per 100, and for work trains 4.31 per 100.

From May 1, 1920, to July 1, 1921, there was another advance; Decision No. 2; that was by the government also, still under the railroad administration, and the freight rate that had been 4.08 was made 5.12, that is approximately a twenty five per cent raise I believe; 1.04 per 100 miles; and the local rate was also raised to 5.08; and the mixed train rate was raised 1.09 per 100 miles and made the same as the local; and the work train rate was raised about .94 per 100 miles. Those rates prevailed from May 1, 1920 to July 1, 1921.

As far as I know those were the highest rates ever paid railroad men in this country.

From July 1, 1921, until this date (the date of the trial) the rates prevailing and in force have been 4.48 in freight service; that had been 5.12; and the local 5.16 that had been 5.80 and the work train service 4.61 that had been 5.25.

Those are the rates now prevailing.

[fol. 274] Taking the mileage and overtime and whatever else went into the calculation of Mr. Moser's time and wages from July, 1921 to April 23, 1923, inclusive, that is during the last wage period, and figuring out what that same amount of mileage and overtime would have made for Mr.

interest prevailing for that character of loan, and it has prevailed in Dallas ever since I can remember, ever since I have been in business.

I can and do place money on real estate security at approximately fifty per cent valuation to net the lender eight per cent, and the borrower pays all the expenses; that is about the way loans are placed there; I have been placing it; I have no difficulty in placing money on that basis.

Cross examination:

Q. You are a business man, are you?

A. I suppose so.

I know something of the different character of investments made in this country by men of means. I know that loans which are made by the issuance of bonds for a period of time, safe and sound security on government bonds and on bonds of big concerns, loans of that kind are made not exceeding four per cent. And I also know that in the investment of any capital that experience and skill is required in making safe investments.

Redirect examination:

I furnish that experience to the people who trust their money to me to loan. I pass on securities for some of them; they can get that experience from prominent brokers without expense to them; perfectly responsible men who are in the business all the time, and the borrower pays the fee for the broker's trouble and all expenses.

[fol. 276] Recross examination:

I don't know that men of great capital and means who have opportunity to invest their capital in this country prefer to put it out at three and a half or four per cent instead of loans on town property.

W. W. Thomas, for defendant, testified:

That he resides in Houston and has been in the real estate business for forty years.

I do a general real estate business, selling real estate, making loans, renting property—just a general real estate business.

Money can be placed in Houston on real estate, good residence property, at approximately fifty per cent of its value and to net the lender on entirely good safe loans without risk to them, eight per cent, and it don't make any difference about the size of the loan. I place all the time loans that I pass on and consider safe of the type stated in the city of Houston. We used to get ten per cent back in the 80's and early 90's, but since that time the rate has been eight per cent.

Eight per cent is the prevailing rate now.

I have been in the real estate business since 1883.

I have been chairman of the board of Appraisement a few times; a citizen member one time, and I have been appraising for the city for seven or eight years, and I attend to that kind of business.

Vendor's lien notes and like securities are not rendered for taxation and are not taxed; may be one per cent of them are; I dare say it would not reach that.

Cross examined:

They do not render them. I say approximately there is only one per cent of notes rendered; as to how I know it, the records will show it; you have got to look at them; I have looked over them; for years I have looked over them. I say approximately one per cent, hardly that in my judgment of notes have been rendered for taxation.

I don't know how many notes are held in Houston by residents of Houston.

Q. And you don't know how many are rendered for taxation in Houston?

A. No, I didn't make a note of it.

Q. Do you know why it is that men of large capital and means in Texas and elsewhere prefer to invest their capital in three and a half to four per cent securities instead of intrusting it to you to loan for them in Houston?

A. I won't admit it.

[fol. 277] M. MAVERICK, for defendant, testified:

That he resides in San Antonio, and has resided *there* twenty-eight years; is in the lumber business.

I work for a lumber company that sells lumber and builds houses and finances houses.

Money can be placed in the City of San Antonio on safe, entirely safe, real estate security, residence houses, not exceeding fifty per cent valuation, net to the lender at eight per cent. As to the extent within the last few years that funds have been so loaned in the city of San Antonio, well for the last seven years of my personal knowledge it has been done, and to my knowledge by looking over the records that condition has run back for a period of years; it has always been at least eight per cent. Our concern has loaned in the last ten years an estimated amount of $10,000,000.00 at that rate and in excess of that; net eight per cent and some more.

There is no difficulty in placing money in safe securities in San Antonio now.

Notes of the character I am talking about are not assessed at all in San Antonio.

Cross examination:

I mean to tell counsel that a man who makes loans in San Antonio, holds notes that are taxable by law, does not render them for taxation, I mean to say that. I don't know whether they do elsewhere or not. I know it because the city attorney made the ruling at one time that he would not assess vendor's lien notes, and in a previous administration about three years ago that subject was brought up and it was decided not to because it would be double taxation, without attempting to argue anything about the merits.

I can only approximate how many notes are held by residents of San Antonio, but it would be several millions of dollars; I dont know positively.

I don't know how many notes on San Antonio property are held by people in the east. Of course I have not gone over the renditions of San Antonio. I am making my answers on the basis of the ruling of the city attorney.

R. M. Anderson, for defendant, testified:

I am in the life insurance business. I have had experience as an actuary; I have been in the life insurance business about twenty years, having taken a four-year course in the University of Michigan in actuary science, and holding a position as actuary for fifteen years. That has been my line of work. My business now is life insurance but more in advising and selling, having gone into that branch of the business three years ago. The last company I was connected with as actuary was a life insurance company at Beaumont, and prior to that time I was with The Amer- [fol. 278] ican National Insurance Company at Galveston. The American National is one of the largest insurance companies.

An actuary is one who investigates mortality experience and compiles figures on mortality tables and interest tables, figuring out any combination required, wherever the life of a man is concerned; in other words, figures out a basis on which insurance companies can write a particular character of risk on a scientific basis so that you know where you are a hundred years from now.

The American Experience Table of Mortality was first published in 1868 by a very renowned actuary by the name of Shepard Homans, who was at the time with the Mutual Life Insurance Company in New York. He compiled the table from actual experience, from the Mutual Life Insurance Company's records at New York. It was the first American table on mortality based on American risks. It was bound to have been based on accepted risks because it was the experience of the Mutual Life Insurance Company and they had only the experience of men who had taken life insurance and which they had accepted. That table is used in practically all of the states as a basis of valuation of life risks.

They have been working on more recent tables and there have been tables published but they are not in practical use.

The Carlisle Tables are not used now; they were used before the American Experience Table. They were predicated on British Experience, that is experience of life insurance companies in the British Empire; they were on accepted risks and they were not predicated on risks of people generally.

The Combined experience of Actuaries Table of Mortality was compiled by sixteen actuaries of Great Britain and from the experience of sixteen life insurance companies of the British Empire.

The American Experience table is the one generally followed in this country. Under that table the expectancy of a man twenty eight years of age is 36.73.

There is a difference made by the insurance companies when a man is employed as railroad brakeman and when a man is employed in the ordinary avocations of life. As to the difference, the table we use is based on selected risks of standard occupations not hazardous. Some companies will not take a railroad brakeman or one in an occupation as hazardous as that. Other companies will take railroad brakemen at the proper rate and they figure a straight premium which is based on the experience of mortality of the class. A few companies arrive at the same result by adding to the age of the man; that is, we add the extra premium in the majority of cases. The difference in expectancy has something to do with the extra premium; he has the expectancy of dying a natural death plus the probability of dying from accidental causes. The difference in the expectancy of a railroad brakeman and the expectancy of a man, farmer, merchant or a man in ordinary life, would figure around eight years at the age of twenty eight. We have to figure up that rate from the amount of extra premium we charge for that class of risk, and converting from extra premium to excess in years it amounts to eight years increase in age. A man twenty eight years old as brakeman for a railroad would be considered by life insurance companies, on account of the extra hazard, a man in that occupation has, an older man than that—we would add eight years to his age, making him thirty six, and his expectancy would be reduced from 36.73 to 31.7, that is his life would be shortened on account of the hazards of his occupation.

[fol. 279] By expectancy of a man's life, if I may use the illustration, some of you men have shot craps or thrown dice probably, and in doing that or thrown a coin we take the coin, it has two sides, we don't know whether one or the other is going to turn up and we can't tell which but we have an even chance it will turn up either head or tail; we know that. You take for instance a man twenty eight

years, there are a certain number of men living, we will say 50,000, and we want to find out how many years that 50,000, each one of the 50,000, has an even chance of living, so we find out that half that number are living at a certain age and that will approximate the expectancy of life. That means a man of the age of twenty eight years, with 50,000 living, there ought to be 25,000 of those men living in 3673.

Q. Then do I understand that that is the average of what men of twenty eight years of age, selected risks on whom you have data, taking the ones that have died and the ones who have lived and the whole bunch all the way through, and divide it by the number of people, and that is where you get the expectancy?

A. We work back by watching them as they did die each year.

Q. It does not mean that Mr. Moser will live thirty six years but he may live beyond that and he may not live that long?

A. Yes, sir, he has a chance to live that many years.

By present value of $1.00 payable monthly for a given period, say ten years or fifteen years, you mean the amount we will have to have in hand right now which invested at a certain rate of interest will provide a fund which will pay a monthly income of $1.00 during that period and be entirely absorbed at the end of that period.

If $1.00 is paid every month for ten years that will mean an amount now invested at the stipulated rate of interest which will pay $1.00 for every month for ten years, and the last dollar will make the last payment; it will be less than $1.00 left for the last payment and the amount left and the interest on it will provide for the $1.00 for the payment at the last of the ten years.

I have figured up the present value of two thirds of $1,800 for seven years, and $2,050 for sixteen years, and of $2,600 for fourteen years, a total of thirty seven years, at the rate of six per cent per annum, would be on such present value $21,845.00. That would be the present value of two thirds of $1,800 for seven years, two thirds of $2,050 for sixteen years, and two thirds of $2,600 for fourteen years. I arrived at that on the monthly paying basis distributed over a period of years. I took an average of the amount paid over a period of thirty seven years and

found the average monthly wage to be $184, and figuring contribution by assuming at least one third of the income in a family of three would be used by the husband and father for his own expenses and upkeep, would leave an average monthly contribution of $123. And then I took the present value of $1.00 over that period of expectancy, 36¼ years, and multiplied the $1.00 present value by the $123 which would give me the present value of $123 paid every month over a period of 36 and a fraction years.

Then with a family of three and an income of $1,800 a year for seven years, and $2,050 a year for sixteen years, and $2,600 a year for fourteen years, and allowing two thirds of that income to the wife and daughter, and figuring at six per cent the present value of the two thirds contribution to them would be $21,845.00.

At seven per cent it would be $19,439.00, and at eight per cent it would be $17,446, that is for 36¼ years, slightly over the expectancy.

[fol. 280] In arriving at these results I multiplied the $1,800 by seven years, the $2,050 by sixteen years and the $2,600 by fourteen years and added the results together and got the total amount which I divided by 27, which would give the average early earnings and divided by 12 which would give the average monthly earnings.

That would be $84,000 gross for that whole period, and figuring the one-third of the amount to be used by the father for his own upkeep it would make an average income about $2,200 per year, and contribution of about $16.34.

The present value of $1.00 per month for 36.73 years, the expectancy of one twenty-eight years of age at seven per cent is $177.48—the amount put at interest now at six per cent would pay $1.00 per month, the parties to receive it for 36.73 years, and the last payment will be just enough to pay the last one dollar.

At seven per cent the present value of the dollar for the same period would be $158.94, and at eight per cent would be $141.84 and having found the average, multiply the present value of one dollar by 123 and that will give you the totals I have stated.

Defendant here offered in evidence the memorandum of the calculations of the witness as follows, to wit:

"Present Value of Contributions Based on Income for Periods as Follows

$1,800.00 per year for	7 years.
2,060.00 per year for	16 years.
2,380.00 per year for	14 years.
Total	37 years.

and then determining an average monthly wage for the entire period which will show the average monthly wage to be $184.00. And, figuring contributions by assuming that at least 1/3 of income in family of three would be used by husband and father for his own expenses and upkeep, leaves an average monthly contribution of $123.00, which reduced to present value, will show as follows:

Present Value of $1.00 per Month for 36.73 Years, (Expectancy Age, 28)

6% $177.60 x 123.00	$ 7,845.00
7% 158.04 x 123.00	19,439.00
8% 141.84 x 123.00	17,446.00

(fol. 281) Witness continues: At six per cent compound interest $10,000 will amount in ten years to $17,910, and in twelve years it will amount to $20,120, and in twenty years to $32,070, and in thirty years to $57,440.00.

$10,000 put out at eight per cent interest will pay $108.25 per month to parties that might be named and absorb it self in ten years; that is adding interest from year to year and taking off the monthly payment stated, the $10,000 will be absorbed in twelve years.

Cross-examination:

What is meant by expectancy is taking the lives of a thousand persons twenty eight years of age and taking the number of years these persons live thereafter, and taking the total number of years altogether and dividing it by 1,000 you get the 36. Taking $1,800 for seven years, $2,060 for sixteen years, and $2,380.00 for fourteen years, the total earnings and not two thirds of it, and figuring the interest at four per cent, the present cash value is $42,416.00.

Redirect examination:

I have been connected with the insurance business in Texas eight years.

I have never seen an annuity sold in Texas by any life insurance company. From my own experience a fellow would not put money into an annuity, he could do so much better in another way.

Annuities are figured by insurance companies at three and a half and four per cent, and sometimes four and a half, but very seldom. They do not sell in Texas because money brings a better rate of interest than that down here.

Defendant rested.

Mrs. Odessa Moser, recalled, testified:

Mr. Moser's health and physical condition before his death was very good. I do not remember of him ever being sick but once and that is when he had a slight attack of influenza. He never did go to the hospital. His mother said he was very healthy and he was very healthy and strong, nearly a two hundred pound man.

Testimony closed.

[fols. 282-332] Stipulations as Statement of Facts

It is agreed by and between the parties to the above entitled and numbered cause, that the above and foregoing is a true and correct statement of the testimony offered and facts proved upon the trial of the above cause at the October Term of the District Court of Bell County; and it is further agreed that on the trial of the cause there were offered in evidence certain photographs of the car in question, marked respectively exhibits "A", "B", and "C", and of the track at or about the place where deceased Moser's body was found after he had fallen through the car, marked exhibits "1", "2", "3", "4", and "5", which said photographs will be filed with the original of this statement of facts, and the transcript in the Court of Appeals, and it is

agreed that they are and shall be taken as a part of this statement of facts.

(Signed) A. L. Curtis, Attorney for Plaintiff.
(Signed) Lee, Lomax & Wren, Attorneys for Defendant.

In District Court of Bell County

Judge's Certificate to Statement of Facts

The above and foregoing having been agreed to by the parties to this cause as a true and correct statement of the testimony offered and the facts proven on the trial of said cause, same is now here approved and ordered filed as a statement of the facts in said cause and made a part of the record herein.

(Signed) Lewis H. Jones, Judge 27th Judicial District of Texas.

[File endorsement omitted.]

[fol. 233] In Court of Civil Appeals of Texas

[Title omitted]

Opinion—Filed October 21, 1925

Suit of Mrs. Oleta Moser as administratrix to recover for the death of her husband, John H. Moser, the action being under the Federal Statute, it being alleged, shown and admitted that Moser was a brakeman in the employ of the Gulf, Colorado & Santa Fe Railway Company at the time he met his death, and that both were engaged in interstate commerce.

There was a trial before a jury on special issues and judgment rendered for the plaintiffs in the sum of $34,000.00, apportioned $18,000 to Mrs. Moser and $16,000.00 to the junior child, Mary Virginia Moser.

Appellant's liability as found by the jury for Moser's death is not questioned on this appeal. Its brief contains 80 assignments of error followed by 58 additional proposi-

tions. We find nothing new or novel in the case, however, and shall not undertake to discuss the assignments in detail, but only to dispose of the issues raised, chief of which is that the verdict is excessive.

Appellant lodges numerous objections to that portion of the Court's charge for the jury's guidance in assessing the amount of damages. We have read carefully the charge and find that it lays down the correct rule as approved by the United States Supreme Court and the courts of this state. C. & O. Ry. Co. v. Kelly, 241 U. S., 485, 60 L. Ed. 1117; I. & G. N. Ry. Co. v. McVey, 99 Tex., 28. Appellant [fol. 234] labors at great length to show that the trial court did not instruct the jury to reduce such future contributions as appellees had a right to expect from the deceased, had he lived, to a present value. We find no merit in this. The language of the charge was that they should fix same "at such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss, etc." The language, "at this time" clearly encompassed present value of future expectations. In addition, evidence as to annuities, interest rates, interest bearing investments, etc., was introduced for the purpose of determining such present value, and the case was tried on that theory. The main charge was sufficient.

Nor do we agree with appellant's contention that there was no evidence that the child could reasonably expect care, training, advice and counsel of her father which would be of pecuniary value to her. She was entitled to recover for such loss. I. & G. N. Ry. Co. v. McVey, supra. Of necessity the pecuniary value of such services is difficult to determine. When the character, education, habits and station in life of the father, the atmosphere in which his child is to be reared, and his affection for and interest in his child are shown, manifesting the fitness of the parent to furnish these elements, there was sufficient evidence to go to the jury on the loss of same; and it was within the sound discretion of the jury, with this light before them to pass upon their value. M. C. Ry. Co. v. Vreeland, 227 U. S. 59, 57 L. Ed. 417. See also I. & G. N. Ry. Co. v. McVey, 83 S. W., 34.

There was no error in permitting appellees to show Moser's earnings at the time of his death and during the

years previous thereto while in appellant's employ as brakeman, nor that he had a reasonable expectancy of being promoted to a position as conductor with increased pay. The admissibility of such testimony has been expressly decided in this state (See Ry. Co. v. Stalcup, 167 S. W., 279; Hines, Director General, vs. Glasgow, 217 S. W., 1114). And in cases brought under the Federal Employers Liabil- [fol. 335] ity Act, in matters of procedure the law of the forum prevails. C. & O. Ry. Co. v. Kelly, supra. Hence the numerous cases cited by appellant and quoted from at length, from other states, have no application to this case. The evidence also showed that the matter of promotion of brakemen to conductors in appellant's employ was not left merely to chance or speculation, but was a fixed rule and policy, recognizing seniority among employes, and had been followed in years past. Ry. Co. v. Elliot, 149 U. S., 268; 37 L. Ed. 731.

Nor was there any error in permitting the appellees to show the rate of interest borne by United States Government bonds, and other safe securities, and the cost of annuities at such rate of interest. Long time investment of large sums of money in safe securities usually yield a lower rate of interest than smaller shorter term loans. The jury was not bound to accept the testimony of real estate brokers and money lenders that money could be made to yield a net rate of 8% on real estate security in Texas. Experienced business men, by the use of their skill and ability, and by reinvestments in small amounts might safely obtain a return of 8%. But in such cases it is the skill of the investor as well as the investment which goes to make up the return. The jury was not bound to accept any fixed rate of interest, nor even a fixed expectancy in years, and could have concluded that for Mrs. Moser and her two-year old child, deprived of both the support and counsel of the husband and father, a permanent investment in guaranteed securities at a low rate of interest was a proper basis for assessing the amount of damages. Such was their province. L. & N. Ry. Co. vs. Holloway, 246 U. S., 525; 62 L. Ed. 869.

We shall not undertake to discuss in detail the 27 special charges requested by appellant and refused by the court. Most of them were either already covered by the main

charge or went to the weight of the evidence, and related to matters which were proper for argument to the jury. There was no error in refusal of the court to instruct the jury to confine the period of Mrs. Moser's recovery to that of her widowhood. Appellant admits that the Texas de- [fol. 336] cisions are against him on this contention.

Nor is there any merit in its contention that in arriving at the amount of Mrs. Moser's recovery, the jury should have been instructed to deduct from the value of his expected future contributions to her, the pecuniary value of her expected future services to him. Under appellant's proposition, if Mrs. Moser had herself been earning an income, and would probably have contributed services to him equal in value to his probable and expected services to her, she would have been entitled to recover nothing for his death. Or, as a reductio ad absurdum, if, as might be true in some instances, the pecuniary value of the services to be rendered the husband by the wife, should exceed the pecuniary value of the services to be rendered the wife by the husband, and the Railway Company should negligently kill the husband, under appellant's theory she would be indebted to the Company for his death.

Appellant cannot impeach the verdict of the jury nor insist that they did not follow the court's charge in arriving at their verdict without showing some misconduct of the jury under Art. 2021, R. S. 1911, Art. 2234, R. S. 1925. In the absence of such misconduct, the mental processes and calculations which guided the jurors, under the court's charge, in arriving at their verdict cannot be inquired into.

Appellant addresses six assignments to argument of appellees' counsel. No objection to such argument was made on the trial, no exceptions thereto appear in the record, and objection was raised for the first time in a motion for a new trial to which was attached a stenographic copy of both the opening and closing address of appellees' counsel to the jury. Under those circumstances these assignments will not be considered.

This brings us to the question of the excessiveness of the verdict. There being no error otherwise, and appellant's liability being fixed, we must view the verdict in the most favorable light of the evidence. There was evidence to show that J. H. Moser was 28 years old at the time he met [fol. 337] his death; that he was in good health, strong,

sober, industrious, efficient, and when not employed, at home with his family; that during the preceding five years in appellant's employ he had earned an average over $2,000 a year; that according to United States mortality tables he had an expectancy of 36.73 years; that he would probably have been promoted to a conductor with an increase of pay within a few years, and had a reasonable expectancy of an average annual income of about $2,300 for the rest of his life, or an aggregate total expected income of about $84,000; that an annuity of $2,000 a year for 36 years would cost $36,720; that deceased loved his family and was devoted to his child. This case is in many respects similar to that of G. C. & S. F. v. Carpenter, 201 S. W., 270, in which this court held that a verdict for $35,000 was not excessive. In Freeman v. McElroy, where deceased was earning $75.00 per month at the time of his death a verdict for $22,500 was held not to be excessive. In Ry. Co. v. Pingenot, 142 S. W., 93, a verdict for $28,500 for death of a man 48 years of age earning $150 a month, in favor of his dependants was held not to be excessive. In Tex. P. & L. Co. v. Bristow, 213 S. W., 702, verdict for loss of deceased who was 31 years old and earning over $2,000 a year, in favor of wife and children for $28,000 was held not to be excessive. In Hines v. Mills, 218 S. W., 777, recovery by the wife and five minor children of a judgment for $40,000 for the death of the husband and father, a fireman 38 years of age and earning $185.00 per month, was not disturbed. In the light of the facts proven and the adjudicated cases, we are not prepared to say that the verdict for appellees for $34,000 is excessive. Nor was its distribution by the jury material to appellant. G. C. & S. F. v. Carpenter, supra.

Finding no error in the record the judgment of the trial court is affirmed.

Affirmed.

——— ———, Associate Justice.

[fols. 338-372] In Court of Civil Appeals of Texas

[Title omitted]

Opinion by Associate Justice Baugh

Judgment—October 21, 1925

This cause came on to be heard on the transcript of the record, and the same being inspected because it is the opinion of the Court that there was no error in the judgment; It is therefore, considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellee, Mrs. Olena Moser as Administratrix of the estate of Jno. H. Moser, do have and recover of and from the appellant, Gulf, Colorado and Santa Fe Railway Company, principal, and its sureties, J. Sealy and H. O. Stein, the amount adjudged by the Court below and all costs in this behalf expended, and this decision be certified below for observance.

In Court of Civil Appeals of Texas

Order Overruling Petition for Rehearing—November 25, 1925

Motion 6121; #6845. Gulf, Colorado & Santa Fe Railway Company vs. Mrs. Olena Moser et al. Appeal from Bell County. Motion for a rehearing. The motion is submitted and is overruled.

[fol. 373] In Supreme Court of Texas

No. —

Gulf, Colorado & Santa Fe Railway Company, Plaintiff in Error,

vs.

Mrs. Olena Moser et al., Defendant in Error

Petition for Writ of Error

Statement of the Case

Suit in the District Court of Bell County by the surviving wife of John H. Moser, as administratrix under the Federal Statute for damages resulting from the death of said Moser which occurred while he was a brakeman in the employ of the Gulf, Colorado & Santa Fe Railway Company, both he and the defendant at the time being engaged in interstate commerce.

It is alleged that while engaged in the performance of his duty at Lyons, Texas, and passing over train of the defendant, he fell through the floor of a car in the train and was run over and killed, the floor being claimed to be defective and dangerous in that it was made of steel which through use, wear or exposure had become rusted, etc., and was not sufficient to maintain the weight of a man. (Tr. 9-13.)

Trial before jury on special issues resulted in a judgment for Mrs. Moser, administratrix, in the sum of $34,000.00, apportioned $18,000.00 to Mrs. Moser and $16,000.00 to the one and only child, at the time of the trial 17 months of age. (Tr. 56-58.)

After motion for new trial in the District Court, appeal was properly prosecuted to the Court of Civil Appeals and the judgment affirmed.

Motion for rehearing was duly filed in the Court of Civil Appeals, which motion was overruled.

Grounds for Jurisdiction

This case is one as to which the jurisdiction of the Court of Civil Appeals is not made final by Article 1821 (1591

[fol. 374] R. S.), damages sought to be recovered by defendant in error exceeding $1,000.

The Supreme Court has jurisdiction of this cause, as your Petitioner conceives and avers, because:

I

This case involves the construction of a statute of the State, to-wit, Article 3234 of the Revised Statutes of 1925, Article 2021 of the former statutes, being Article 1371 of the Revised Statutes of 1895 as amended by Chapter 18, Acts of the 29th Legislature, page 31, providing in substance that where the ground for motion for new trial is misconduct of the jury that the court shall hear evidence thereof from the jury or others in open court and may grant a new trial if such misconduct is proved, the Honorable Court of Civil Appeals erroneously holding that the refusal of the jury to follow the instructions which the Court of Appeals holds the trial court gave to the jury, would not constitute misconduct on the part of the jury within the meaning of this statute and could not be considered by the court and did not constitute ground for reversal, although absolutely established by the testimony of the jurors.

II

The Honorable Court of Civil Appeals for the Third Supreme Judicial District holds differently from prior decisions of the Supreme Court of this State and of other Courts of Civil Appeals upon questions of law arising in this case as follows, to wit:

The Court of Appeals in this case holds that the disregard by the jury of the instructions that the Court of Appeals says was given by the trial court to the jury, to reduce the contributions that they found might reasonably have been expected by Mrs. Moser and her daughter from the continued life of Moser to a present value and the failure of the jury to apply such rule in the determination of their verdict in this case (that they did so disregard the charge of the court and fail to apply such rule being shown by the undisputed testimony of nine of the jurors) did not constitute misconduct under Article 2234 Revised Statutes of 1925, old Article 2021, and in so holding it holds differently:

(a) From the decision of this Court in the case of Harvey v. G. C. & S. F. Railway Co., recently decided, wherein it is held that the jury being directed by the Judge to disregard the legal effect of their answers to the questions submitted, that it was misconduct on the part of the jury requiring a reversal for the jury in violation of this express direction to make an agreement to give the defendant in error a certain sum as damages and then to answer the other questions so "she should get the money."

(b) From the decision of the Court of Civil Appeals at Waco in the case of Payne v. Smith, 266 S. W. 441 (quoted with approval by this Court in the Harvey decision), wherein it was held that it was misconduct on the part of the jury requiring a reversal of the cause for two of the jury to have considered the items of doctors' bills, nursing, medicine, etc., amounting to about $500.00 in disregard of, and contrary to the instruction of the Court directing them not to consider such items.

[fol. 375] (c) From the decision of the Court of Appeals at San Antonio in the case of San Antonio Traction Company v. Cassanova, 194 S. W. 1190, wherein it is held, as expressly stated by this Court in the Harvey case "that the action of the jury in disregarding the instruction of the Court was such misconduct as to require the granting of a new trial; the disregard of the instruction in the Cassanova case moreover not being as in this case the disregard of an express instruction, but consisting in the consideration of elements and items of damage that were not submitted by the charge of the Court—that is the disregard of that instance was negative and not affirmative, and yet it was held in that case that consideration of elements of damage not submitted by the jury, which was shown by the testimony of the jury themselves, was misconduct requiring reversal.

(d) From the decision of the Court of Appeals at Galveston in the case of Crystal Palace Co. v. Roempke, 227 S. W. 230, the holding being substantially the same as in the Cassanova case, wherein it was held misconduct on the part of the jury requiring the granting of motion for new trial where the jury considered hospital charges and doctor's fees when no such elements of damage were submitted to them by the charge, the misconduct on the part of the

jury consisting in disregard of the court's charge and failure to follow the same in that they considered elements of damage not submitted by the charge.

(e) From the decision of this court in Hines v. Parry, 238 S. W. 887, where it is in effect held that the misconduct of a jury in conversing about the case with an outsider during the trial contrary to the provisions of Article 1960 Vernon's Revised Civil Statutes and communicating what was stated to the jury required the granting of a new trial, the effect of the holding being that violation of the charge and instruction of the Court constituted reversible error.

(f) From the decision of the Court of Appeals at San Antonio in the case of Foley v. Northrup, 47 Tex. Civ. App. 282, wherein it is held that under the Amendment of 1905, an agreement among the jury to a quotient verdict, each party setting forth what he thought ought to be allowed, and dividing it by twelve, could be shown, although it could not have been shown prior to that amendment; the conduct of the jury in the Foley case not falling within those provisions of the amendment as being misconduct of the officer in charge of the jury or being a communication made to the jury or being the result of reception of other testimony by the jury, falls necessarily within the first and general statement of the Statute, to-wit: "misconduct of the jury," and it is manifest that in order to determine such misconduct it would be necessary to inquire into both the mental processes of the jury and their calculations. While the Court of Appeals at Austin in this case holds that it can not inquire into such mental processes and calculations and in effect limits the misconduct that may be shown to those special provisions of the Statute where the grounds for the motion are: "misconduct of the officer in charge of the same (i. e. the jury), or because of any communication to the jury, or because the jury received other testimony," wholly disregarding and in effect eliminating the other broad and general provision of the Statute where the ground of the motion is misconduct of the jury," the Statute putting no limit to the inquiry except the question of whether the action of the jury is misconduct.

[fol. 376] (g) From the decision of the Court of Appeals at Galveston in San Antonio & Aransas Pass v. Wells, 146

S. W. Rep. 645, on similar grounds and for similar reasons, the Court of Appeals at Austin evidently overlooking the fact that the Amendment of 1909, as held by the Court of Appeals at Galveston, had abrogated and set aside that line of cases illustrated by the case of Texas Railway v. Ricketts, 96 Tex. 71, and the authorities there cited.

III

The Honorable Court of Civil Appeals for the Third Supreme Judicial District holds differently from the prior decision of the Court of Appeals at Galveston in G. C. & S. F. Ry. Co. v. Southwick, 50 S. W. 593, wherein it is held the defendant was entitled to have the jury instructed that in determining the value of the wife's services to her surviving husband the measure of damages would be the pecuniary value of her services "less the cost of suitably and properly maintaining her," while the Court of Appeals in this case holds that the defendant was not entitled to have the jury instructed that the amount of contributions allowed should be less the value of the services that the wife, the plaintiff, would have rendered the deceased, the husband, and of which she was relieved by his death. The underlying principle in the two cases is the same, to wit: that the true rule of damage is the difference between what is lost and what is saved or gained as the result of the act—compensation only be the limit of recovery.

IV

That errors of law have been committed by the Honorable Court of Civil Appeals at Austin of such importance to the jurisprudence of the State as require correction as follows, to wit:

(a) The Act of the 29th Legislature amending Art. 1371 of the Revised Statutes of 1895, which amendment is now Art. 2234 Rev. Statutes of 1925, was a remedial act providing the right of inquiry to litigants into the proceedings of jurors to ascertain and determine as to their misconduct, if any, which laid down a rule of procedure at variance with the rule theretofore established by the decisions of the courts and provided (the numerals in parentheses are inserted by us) that where the ground of the motion is (1)

" misconduct of the jury, or (2) of the officer in charge of the jury, or (3) because of any communication made to the jury, or (4) because the jury received any other testimony" that it shall be competent to prove such facts by the jurors upon examination in open court and if "(1) the misconduct is proven, (2) or the testimony received, (3) or the communication made, be material," a new trial may be granted. Yet, the Austin Court of Appeals holds in effect that a showing that the jury did not follow the rule laid down by the Court for the determination of damages is not a showing of misconduct and that the Court could not inquire into the mental processes and calculations which guided the jury, thereby practically nullifying the Statute, or at least that part of the Statute which permits an inquiry generally into the "misconduct of the jury," and confining the operation of the Statute to misconduct of the officer in charge of the jury or the matter of a communication being made to the jury or the matter of a reception by the jury of other testimony—so clearly cutting down and abridging the clear purpose and intent of the Legislature.

(b) It is settled by the decision of the Supreme Court of the United States in C. & O. v. Kelly, 241 U. S. 485, that in a case of this kind contributions reasonably to be expected [fol. 377] through a period of years must be reduced to a present value and in that connection the earning value of the money presently to be awarded must be taken into consideration and determined in reduction on the award. The verdict, considered in the light of the testimony taken on the trial and the testimony of the jurors themselves show that no attempt was made to reduce to present values or to determine the earning power of the amount presently to be awarded. In this the Court of Appeals holds there was no error, thereby sustaining the action of the jury below in following the rule laid down by the Court of Appeals of Kentucky condemned by the Supreme Court of the United States.

(c) The Court of Appeals holds that the use of the language by the trial court in his charge that the jury should fix the damages "at such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss," i. e.,

that the language "at this time" in itself "clearly encompassed the present value of future expectations," and that the charge was not subject to objections that instead of the language used the Court should have told the jury that they would assess the plaintiff's damage "at the present value of the contributions in money," and that the Court should explain to the jury how the present value of such contributions may be determined under the evidence; and that it was not subject to the objection that it was generally too broad and not definite and specific enough and should in more detail have instructed the jury as to what amount they might consider and that more definite and specific instructions requested by the defendant applicable to the testimony were not required to be given, the result being that, as is manifest from their verdict and as clearly established by their testimony, the jury did not under the Court's charge to require any reduction to present values and made no such reduction.

(d) Contrary to the well established rule in this State, the Court of Appeals holds that it was not necessary to give clearer and fuller instructions on the measure of damages, in spite of the fact that the language of the charge was vague and indefinite and calculated to mislead and the particulars in which it was insufficient were specifically pointed out and full special instructions were requested.

(e) Because the Court of Appeals holds that the defendant was not entitled to have the jury instructed that in determining of their award in favor of Mrs. Moser the jury should take into consideration the value of the services that Mrs. Moser would have rendered to her husband had he continued to live and the rendering of which services she was relieved by his death. This ruling disregards the universal principle that damages must be confined to compensation and that if from the act from which a loss results there also follows a gain either by receipt of something that otherwise would not have been received or from relief from doing something that otherwise would have had to be done, that the benefit should be offset against the loss. [fol. 378] And further in that the Court of Appeals applied the same ruling in the matter of the child and held that the defendant was not entitled to have the jury in-

[fol. 459] In Supreme Court of Texas

[Title omitted]

Judgment—January 20, 1926; filed in Court of Civil Appeals February 26, 1926

This day came on to be heard the application of Plaintiff in error for a writ of error to the Court of Civil Appeals for the Third District and the same having been duly considered, it is ordered that said application be dismissed for want of jurisdiction; that the applicants, G. C. & S. F. Ry. Co. and sureties, Sealy and H. O. Stein pay all costs incurred on this application.

In Supreme Court of Texas

Clerk's Certificate to Order Denying Petition for Rehearing

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said court, this the 25th day of February, 1926.

F. T. Connerly, Clerk, by B., Deputy.

I further certify that a motion for rehearing, by the plaintiff in error, was overruled in the Supreme Court on February 17th, 1926.

F. T. Connerly, Clerk Supreme Court. (Seal.)

[File endorsement omitted.]

[fol. 460] In Court of Civil Appeals of Texas

[Title omitted]

Petition for and Order Staying Execution

To a judge of the Honorable Court of Civil Appeals for the Third District who participated in rendering the judgment in said cause:

Your petitioner shows and alleges the fact to be that it considers itself aggrieved by the decision of the trial court and by the decision of this Honorable Court in this cause and desires to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, this said cause being one in which your petitioner is entitled to apply to the United States Supreme Court for writ of certiorari in that this case arises under the Federal Employers' Liability Act enacted by the United States Congress.

Your Petitioner further represents and shows and charges the fact to be that unless it is granted a stay of execution and enforcement of said judgment, while your petitioner is applying for said writ of certiorari to the United States Supreme Court that execution may be issued against it.

In accordance with said Act of Congress, your petitioner tenders herewith good and sufficient security, conditioned as required by said Act and offers to comply with any and all requirements imposed by the law to enable it to remove said cause by certiorari to the Supreme Court of the United States.

Wherefore, your petitioner prays for stay of execution and enforcement of such judgment as provided for by Subdivision D of Section 8 of the Act of Congress of the United States of February 13, 1925, and which became effective May 13, 1925, to enable your petitioner to apply for and obtain a writ of certiorari from the Supreme Court of the United States, and your petitioner prays that the Clerk of this Court and the officers of this Court, as well as the District Clerk and the appellee herein and her attorneys be stayed from getting out execution and enforcement of such judgment until your petitioner can apply for and obtain a

writ of certiorari from the Supreme Court of the United States.

[fol. 461] Gulf, Colorado & Santa Fe Railway Company by Lee, Lomax & Wren, Its Attorneys of Record.

In the above case upon this 18th day of March, A. D. 1926 the Gulf, Colorado & Santa Fe Railway Company, having duly presented the above application for a stay of execution and enforcement of the judgment heretofore rendered in the above cause for the purpose of applying for and obtaining a writ of certiorari from the Supreme Court of the United States, as provided for by the Act of Congress of February 13, 1925, and which became effective May 13, 1925, and it appearing that said petitioner from its application and under the law has the right to apply for said writ of certiorari from the Supreme Court of the United States, a stay of execution and enforcement of the judgment herein entered is granted for the time provided by the laws of the United States pertaining thereto, and upon the execution and approval of bond conditioned as required by law and upon the filing of such bond duly approved in the sum of Two Thousand Dollars ($2,000.00), the Clerk of this Court will not issue a mandate in this case, nor will any process to enforce such judgment issue until action of the Supreme Court of the United States on the petition for certiorari in this cause, or until it shall appear that application for certiorari to said Supreme Court of the United States has not been made within the time required by law; and said petitioner, the Gulf, Colorado & Santa Fe Railway Company is granted a stay of execution and enforcement of said judgment, and the Clerk of this Court nor anyone else, including appellee or anyone acting for her, shall be permitted to get out execution or enforce the judgment herein, except as provided for herein in this order.

James W. McClendon, Judge of the Court of Civil Appeals for the Third Supreme Judicial District of Texas and who sat in the rendering of the judgment in this cause.

[fols. 462 & 463] Bond on stay for $2,000, approved and filed March 18, 1926, omitted in printing.

[fols. 464 & 465] In Court of Civil Appeals of Texas

[Title omitted]

Stipulation re Transcript of Record—Filed March 15, 1926

It is agreed by and between the parties to the above entitled and numbered cause that in the transcript of the record as made up to accompany the application of the appellant, The Gulf, Colorado & Santa Fe Railway Company, for certiorari to the Supreme Court of the United States, that said appellant, the said Gulf, Colorado & Santa Fe Railway Company may direct the clerk to omit from the copy of brief for appellant for such transcript of the record and from the application for writ of error and the copy thereof for such record all statements and all argument and citation of authorities or so much thereof as in the opinion of said Gulf, Colorado & Santa Fe Railway Company and its counsel it is desirable and proper to omit for the purpose of shortening the record. And the appellee in this cause, Mrs. Olena Moser, by her counsel, here now joins in the request to the clerk to omit such portions of said brief of appellant in this court and of the application for writ of error to the Supreme Court of the State of Texas as may be requested by the said appellant, the Gulf, Colorado & Santa Fe Railway Company, and its counsel within the limitations herein stated.

(Signed) A. L. Curtis, Attorney for Appellee, Mrs. Olena Moser.

[File endorsement omitted.]

[fol. 466] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 467] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation by Petitioner as to Parts of Record to be Printed

To the clerk of the Supreme Court:

Comes now the petitioner, Gulf, Colorado & Santa Fe Railway Company, and files a statement of the points on

which petitioner intends to rely and in connection therewith designates the parts of the record which petitioner thinks necessary for the consideration of said points, with proof of the service of the same on respondent.

Points Upon Which Petitioner Intends to Rely

[fol. 468] (1) The brief and indefinite expressions of the Court's charge to assess the damages "at such sum of money as paid in cash at this time would be sufficient to fairly compensate the surviving wife and child" for the actual pecuniary loss, and they should find what amount of money "if paid in cash now would fairly and reasonably compensate the surviving widow, etc." are not sufficient to convey to the minds of an average jury the rules laid down by this Court in the C. & O. v. Kelly and C. & O. v. Gainey; that the charge as given is open to the defendant's objections that it was not definite enough and specific enough and that the jury should have been told that they would assess plaintiff's damage "at the present value of the contributions in money;" and should explain to the jury how such present value of such contributions may be determined from the evidence; and it did not give the jury any rule or formula by which they might determine the amount of money as if paid now would fairly and reasonably compensate, etc.

(2) Defendant was entitled to have its special charge No. 8 given, specially in view of the vague and indefinite expressions used by the Court in its charge on the question of reduction to present values. It is the definite holding of this Court in the Kelly case that "in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award;" and it was undisputed that money could be made to earn safely in Texas net 8%; but concealing that the right of the court to fix that as a rate might be open to question, it is certainly the law that it was the jury's obligation to reduce the contributions at the highest rate of interest they found the testimony showed could be had on money safely invested. The special charge as asked leaves it to the jury to determine what such rate was but charges them with

the obligation to determine such a rate and use it in reducing to present values.

(3) The record shows that the amount of the award will yield the plaintiffs throughout their entire lives at reasonable rates of interest even more than the annual earnings of the deceased and leave the principal intact at the deaths of the beneficiaries; and certainly under any rates of interest entitled to be considered, bringing every year during their lives more than any probable contributions of de- [fol. 469] ceased and still have their principal intact at their death, and it is absolutely clear that the rule of C. & O. v. Kelly has not been applied in this case and that the award is clearly in violation thereof and grossly in excess of what would be a proper award under the rule.

(4) The testimony of the jury shows unqualifiedly that the defendant's exceptions to the charge were well taken; that the jury would not understand therefrom that reduction to present value was required; and that as a matter of fact no attempt was made to reduce to present values; and that the award was made under the rule laid down by the Supreme Court of Kentucky and not under the rule of this Court.

(5) By the death of Moser his wife and child were relieved of service to him that the relationship cast upon them and defendant was entitled to have the jury instructed that such savings of service should be considered by them in reduction of any award they might otherwise make.

(6) That a woman as young as Mrs. Moser would marry again was altogether reasonable and the just and sound rule is that such probability should be considered by the jury in determining the damages.

(7) There was nothing in the evidence to show that Moser had by temperament or training any qualifications that would render any nurture, advice or training, a matter of pecuniary value. In any event, the only elements of that character that could be recovered for were such as had pecuniary value, that is, such as could be supplied by another for compensation and the jury should have been instructed such elements only could be considered.

(8) Defendant was entitled to have its special instructions given directing the jury to consider the probability, if any, of a reduction of wages by reason of return to normal conditions after the abnormal conditions of the War; the probable diminution of income reasonably to be expected from advancing age and from sickness and being out of employment, etc.; and the hazardous nature of the employment in which deceased was engaged.

Parts of the Record Deemed Necessary to Print

[fol. 470] Transcript Trial Court

	Record page
1. Caption	0
2. Plaintiff's First Amended Original Petition	7
3. Defendant's First Amended Original Answer	12
4. Defendant's Special Charge No. 3 Refused and endorsement	16
5. Defendant's Special Charge No. 4 Refused and endorsement	17
6. Defendant's Special Charge No. 7 Refused and endorsement	20
7. Defendant's Special Charge No. 8 Refused and endorsement	21
8. Defendant's Special Charge No. 9 Refused and endorsement	22
9. Defendant's Special Charge No. 10 Refused and endorsement	23
10. Defendant's Special Charge No. 11 Refused and endorsement	24
11. Defendant's Special Charge No. 17 Refused and endorsement	31
12. Defendant's Special Charge No. 18 Refused and endorsement	32
13. Defendant's Special Charge No. 24 Refused and endorsement	38
14. Defendant's Special Charge No. 25 Refused and endorsement	39
15. Defendant's Special Charge No. 26 Refused and [fol. 471] endorsement	40
16. Charge of the Court	42
17. Defendant's Exceptions to Court's Charge	48
18. Judgment	52

19. Portions of Defendant's Amended Motion for New trial, to wit:

	Record page
Caption and heading	58
Third Ground of Motion	58
Fourth Ground of Motion	59
Seventh Ground of Motion	60
Eighth Ground of Motion	60
Ninth Ground of Motion	60
Tenth Ground of Motion	61
Eleventh Ground of Motion	62
Seventeenth Ground of Motion	65
Eighteenth Ground of Motion	65
Twenty fourth Ground of Motion	68
Twenty fifth Ground of Motion	68
Twenty sixth Ground of Motion	68
Thirty first Ground of Motion	70
Thirty second Ground of Motion	71
Thirty third Ground of Motion	71
Thirty fourth Ground of Motion	71
Thirty fifth Ground of Motion	72
Thirty eighth Ground of Motion	73
Thirty ninth Ground of Motion	73
Fortieth Ground of Motion	73
Forty first Ground of Motion	73
Forty third Ground of Motion	74
Forty fourth Ground of Motion	74
Forty fifth Ground of Motion	75
Seventy second Ground of Motion	82
Seventy third Ground of Motion	83
Seventy sixth Ground of Motion	84
Seventy eighth Ground of Motion	85
Seventy ninth Ground of Motion	85
Eightieth Ground of Motion	86
Eighty fifth Ground of Motion	89
Ninety eighth Ground of Motion	97
Ninety ninth Ground of Motion	97
One Hundreth Ground of Motion	98
One Hundred first Ground of Motion	99
[fol. 472] One Hundred Second Ground of Motion	101
One Hundred Second a Ground of Motion	101
One Hundred Third Ground of Motion	101
One Hundred Fourth Ground of Motion	101
One Hundred Fifth Ground of Motion	103
One Hundred Sixth Ground of Motion	103

	Record page
20. Defendant's Bill of Exceptions C	153
21. Defendant's Bill of Exceptions G	164
22. Defendant's Bill of Exceptions P	170
23. Defendant's Bill of Exceptions XX	173
24. Order Overruling Motion for New Trial	191
25. Certificate District Clerk Bell County	233
26. Statement of Facts:	
Portions of—as shown.	
Testimony of Mrs. Olena Moser	236
Testimony of James Harrison	238a
Letters of Administration	240
Agreement as to Interstate Character of employment	240
Tender of tabulated Statement of Earnings of Moser	240
(It is not necessary to print tabulated statement except the following	244A

"That the earnings of said Moser by years was as follows:

Year	Amount earned
1918	513 33
1919	883 50
1920	2,433 07
1921	2,206 64
1922	1,675 46
1923	534 24
Total	8,245 24

That the earnings of said Moser for the period December 7, 1915 to December 31, 1917 were $867 13

(fol. 473) For period January 1, 1918 to January 1, 1919 513 33

For the period January 1, 1919 to May 1, 1920 1,563 93

For the period May 1, 1920 to July 1, 1921 2,890 31

For the period July 1, 1921, to April 23, 1923 3,271 83"

	Record page
Testimony of C. C. Grazier	245
Testimony of J. F. Francis	250
Testimony of Mrs. N. A. Shanklin	251
Testimony of W. J. Bassett	251
Testimony of C. E. Hillier	252
Testimony of E. E. Baldridge	253
Testimony of Mrs. Olena Moser	256
Testimony of Ed. Temple	257
Testimony of Brit Stanton	257
Testimony of E. T. Kennan	258
Testimony of M. W. G. Hileman	261
Testimony of —— Barrett	263
Testimony of J. R. Rison	265
Testimony of Stanley Dean	266
Testimony of D. H. Mathias	268
Testimony of E. R. Hicks	269
Testimony of A. L. Hughes	270
Testimony of A. L. Shafer	270
Testimony of C. H. Tiglar	270
Testimony of C. C. Dickson	271
Testimony of G. C. Cloud	273
Testimony of W. W. Thomas	276
Testimony of M. Maverick	277
Testimony of R. M. Anderson	277
Testimony of Mrs. Olena Moser	281
Agreement and Approval Statement of Facts	282

Record Court Civil Appeals

27. Opinion Court of Civil Appeals	283
28. Judgment Court of Civil Appeals	337
29. Order overruling Motion for Rehearing	338

Record Supreme Court of Texas

30. Application for Writ of Error—heading and statement of the case	339
Grounds of Jurisdiction	339-359
[fol. 474] 31. Order Supreme Court of Texas dismissing Application for Writ of Error for Want of Jurisdiction	459
32. Order Overruling Motion for Rehearing on Application for Writ of Error in the Supreme Court of Texas	459

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 10, 1926

The petition herein for a writ of certiorari to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2374)

No. [illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

GULF, COLORADO & SANTA FE RAILWAY COMPANY,
Petitioner,

vs.

MRS. OSSIE MOORE, ADMINISTRATRIX, *Respondent.*

PETITION FOR CERTIORARI, MOTION, NOTICE AND BRIEF

ALEX. BRITTON,
J. W. TERRY,
CHAS. E. LEE,
Attorneys for Petitioner.

[illegible]

SUBJECT INDEX

	Page
Petition for Certiorari	1–16
Short Statement of the Case	2–13
Action for death under Federal Employes' Liability Act	2
Expectancy of Deceased	2–3
Earnings and Prospects of Promotion	2–4
Present Value of Contributions	4–5
Verdict and Judgment	5
Further Testimony as to Damages	5–6
Court's Charge and Objections thereto	6–8
Instructions of Defendant Requested and Refused	8–10
Prevailing Rates of Interest in Texas	10–11
Testimony of Jury on Hearing of Motion for New Trial	11–13
Reasons Relied on for Allowance of Writ	13–16
Charge does not properly instruct jury as to reducing contributions to present value and defendant's requested instructions should have been given	13–14
Argument on	24–30
Damages were assessed contrary to C. & O. v. Kelly and C. & O. v. Gainey, 241 U. S.	14–15
Argument on	18–24
Court should have instructed jury to consider services wife and child would have rendered deceased of which they were relieved by his death	15
Argument on	30–32
Court should have instructed jury to consider probability of Mrs. Moser marrying again	15
Argument on	32
Nurture, advice and training by father should not have been submitted	15–16
Argument on	33–35

Page

Defendant's instructions to consider probable effect on earnings of return to normal conditions after war; advancing age; possible sickness and lack of employment; and hazardous nature of employment, etc. 16
Argument on 35–37

Brief and Argument 17–35
Jurisdiction shown 17–18
Verdict determined contrary to Kelly and Gainey cases 18–24
Charge of court did not properly submit rule of Kelly and Gainey cases 24–30
Value services wife and child to deceased should have been considered 30–32
Probability Mrs. Moser marrying again should have been considered 32
Advice and training by father should not have been submitted 33–35
Probable effect on earnings of return to normal conditions after war; of advancing age; possible sickness and hazardous nature of employment should have been submitted 35–37

INDEX OF AUTHORITIES

	Page
A. & W. v. Newton, 11 S. E. 776	23
American Ry. Co. v. Didrickson, 227 U. S. 145	33
Burns v. R. R., 68 Atl. 704	36
C. & O. v. Kelly, 241 U. S. 485	13, 18
C. & O. v. Gainey, 241 U. S. 494	13, 18
Central R. R. v. Rouse, 3 S. E. 307	23
Chaffin v. N. & W., 93 S. E. 822	23
Corpus Juris, Vol. 17, Title "Death," Sec. 233	30
G. C. & S. F. Ry. v. Conley, 113 Tex. 473	28
G. C. & S. F. Ry. v. Locker, 273 S. W. 831	28
Grand Fraternity v. Melton, 102 Tex. 402	28
G. C. & S. F. Ry. v. Southwick, 30 S. W. 593	30
Gorton v. Harmon, 152 Mich. 472, 116 N. W. 443	30
Griffey v. Pac. Elec. Co., 209 Pac. 50	31, 34
Glasgo v. Green, 117 Atl. 79	36
Hines v. Pennington, 240 S. W. 704	29
Hall v. Ripple, 145 S. W. 311	29
Jones v. Kansas City Southern, 78 So. 568	23, 37
Jones v. McMillan, 129 Mich. 86, 88 N. W. 206	32
L. & N. v. Trammel, 9 So. 870	23
McAdory v. L. & N., 10 So. 507	23
McDonald v. Iron & Steel Co., 103 N. W. 829	31
Mich. Central v. Vreeland, 227 U. S. 59	33, 35
N. Carolina v. Zachary, 232 U. S. 248	18
Osborne v. Bank, 9 Wheat 737	29
St. L. I. M. & S. Ry. v. McWhirter, 229 U. S. 256	17
St. L. I. M. & S. Ry. v. Taylor, 210 U. S. 281	17
Seaboard Air Line v. Duvall, 225 U. S. 477	17
Seaboard Air Line v. Horton, 233 U. S. 492	18
Simmons v. L. R. & N. Co., 96 So. 12	23, 37
Sipes v. Mich. Cent., 231 Mich. 404, 204 N. W. 84	24, 32, 34
Seaboard Air Line v. Tilghman, 237 U. S. 499	30
Synder v. L. S. & M. C., 91 N. W. 646	31